REAUTHORIZING THE "WAR ON TERROR": THE LEGAL AND POLICY IMPLICATIONS OF THE AUMF'S COMING OBSOLESCENCE

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I. Introduction—Ten Years After 9/11, Whither the War on Terror?

Ten years after the terrorist attacks of September 11, 2001, the United States is reassessing its struggle against terrorism. The armed conflict against terrorist groups,[1] which most consider to have begun in the fall of 2001 with the September 11 attacks and the subsequent invasion of Afghanistan to depose the Taliban regime, has spread to multiple locations throughout the world.[2] Mirroring the geographic

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[1] The debate on what label should be used for the armed conflict authorized by the Authorization for Use of Military Force (AUMF)—War on Terror, Global War on Terrorism, GWOT, or The Long War—is an important one, but not one that I will engage in this article. *See generally* Herbert W. Simons, *From Post-9/11 Melodrama to Quagmire in Iraq: A Rhetorical History*, 10 RHETORIC & PUB. AFF. 183, 184 (2007) (arguing that rhetorical analysis "helps explain why" after 9/11 "the administration chose to evade the hard questions of motivation for the attacks and to respond instead with a sanitized, melodramatic framing of the crisis, coupled with the launch of a vaguely defined, seemingly unlimited 'war on terror'"). It suffices for this article's purpose that the U.S. Supreme Court has recognized that there exists a "conflict with al Qaeda" that is separate from the conflict with the Taliban, and that the former implicates the AUMF. Hamdan v. Rumsfeld, 548 U.S. 557, 628–29 (2006) ("Hamdan was captured and detained incident to the *conflict with al Qaeda* and not the conflict with the Taliban. . . .") (emphasis added); *see also* Jack Goldsmith, *Long-Term Terrorist Detention and a U.S. National Security Court*, *in* LEGISLATING THE WAR ON TERROR: AN AGENDA FOR REFORM 75, 77 (Benjamin Wittes ed., 2009) ("[E]very branch of the U.S. government today agrees that the nation is in an 'armed conflict' (the modern legal term for 'war') with al Qaeda, its affiliates, and other Islamist militants in Afghanistan, Iraq, and elsewhere.").

[2] Recent media coverage has focused on the armed conflict against Al Qaeda's expansion to Yemen and the Horn of Africa. Craig Whitlock & Greg Miller, *U.S. Assembling Secret Drone Bases in Africa, Arabian Peninsula, Officials Say*, WASH. POST, Sept. 20, 2011, http://www.washingtonpost.com/world/national-security/us-building-secret-drone-bases-

diffusion, the conflict has also spread to other organizations beyond those that perpetrated 9/11. Although initially a conflict with Al Qaeda,[3] the conflict now encompasses organizations, groups, and networks as diverse as Al Qaeda in the Arabian Peninsula, the Pakistani Taliban, the Haqqani Network in Pakistan, Jemaah Islamiyah in Indonesia, Boko Haram in Nigeria, and Al Shabaab in Somalia.[4] This diffusion, combined with the increasingly publicity surrounding drone attacks[5] and the inevitable reflection brought about by decennial anniversaries,[6] has led to renewed debate about the United States's "war on terrorism" and the law that has authorized it to date.

This article, prompted by Congress's recent failed efforts to revisit and refine the September 18, 2001, Authorization for Use of Military Force (AUMF), argues for a "middle ground" approach to the statute's reauthorization. It makes the case that a new authorization is needed because, contrary to the Obama Administration's suggestions, the current statute is rapidly approaching obsolescence. Despite the intense media focus on the most recent legislative cycle, Congress has left the 2001 authorization legally unaltered and still anchored to the September 11, 2001, attacks. Confronting this reality presents three options: foregoing military operations against non-Al Qaeda terrorist organizations,

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in-africa-arabian-peninsula-officials-say/2011/09/20/gIQAJ8rOjK_story.html (describing the Obama administration's "constellation of secret drone bases [in Ethiopia, Djibouti, Yemen, and the Seychelles] for counterterrorism operations in the Horn of Africa and the Arabian Peninsula"). However, the U.S. military's counterterrorism operations extend throughout the globe. In fact, the Department of Defense's Global War on Terrorism Expeditionary Medal recognizes individuals for service in dozens of countries, including in the Middle East, North Africa, West Africa, East Africa, South America, Europe, and Guantanamo Bay, Cuba. *Global War on Terrorism Expeditionary Medal*, AIR FORCE PERSONNEL CTR., http://www.afpc.af.mil/library/factsheets/factsheet_print.asp?fsID=7812&page=1 (last visited June 24, 2012).

[3] This article uses the spelling "Al Qaeda" throughout, but respects the choices of other authors, leaving quoted sections as originally written.

[4] *See, e.g.*, Paul R. Pillar, *The Diffusion of Terrorism*, 21 MEDITERRANEAN Q. 1, 3 (2010) ("Al Qaeda is, despite its salience and name recognition, only a piece of the larger organizational picture of Islamist terrorism."); Thom Shanker & Eric Schmitt, *Three Terrorist Groups in Africa Pose Threat to U.S., American Commander Says*, N.Y. TIMES, Sept. 14, 2011, http://www.nytimes.com/2011/09/15/world/africa/three-terrorist-groups-in-africa-pose-threat-to-us-general-ham-says.html.

[5] *See* PETER BERGEN & KATHERINE TIEDEMANN, NEW AMERICA FOUND., THE YEAR OF THE DRONE: AN ANALYSIS OF U.S. DRONE STRIKES IN PAKISTAN, 2004–2010 (2010), *available at* http://counterterrorism.newamerica.net/sites/newamerica.net/files/policydocs/bergentiedemann2.pdf.

[6] *See, e.g.*, Symposium, *Unsettled Foundations, Uncertain Results: 9/11 and the Law, Ten Years After*, 63 RUTGERS L. REV. 1085 (2011).

accepting the AUMF's obsolescence and relying on alternative legal authority, or refashioning a new domestic statutory authority for the U.S. military's global anti-terrorist operations.

A new AUMF is the best option available to U.S. policymakers if it is to continue its military efforts against terrorist groups and networks.[7] A new authorization would clarify the authority the current AUMF grants to the president, which, especially as it relates to the use of military force against U.S. citizens and within the domestic territory of the United States, is extraordinarily vague. A new authorization would also avert tempting, but ultimately dangerous, legal alternatives—namely, harmful interpretations of domestic and international law. On the domestic front, reverting to a reliance on the president's Commander in Chief powers would place the U.S. military's global anti-terrorism efforts on a fragile legal foundation already weakened by the Supreme Court's skepticism and further remove this important military campaign from effective democratic control. In the international arena, relying instead on an overly expansive interpretation of the right to self-defense under international law would undermine the Obama Administration's efforts to lead by legal example and encourage the proliferation of a potentially destabilizing understanding of the *jus ad bellum*. Reaffirming the AUMF is therefore not just an issue of legal and academic curiosity, but a matter of vital domestic and international concern. Despite the urgent need for a proper legal basis for U.S. military counterterrorism operations, however, Congress's recent efforts have fallen short. This article thus argues generally for a new AUMF, but also specifically that the new authorization should strike a measured balance, granting the President the power to effectively combat global terrorism while stopping short of authorizing unlimited, permanent war with whomever the President deems an enemy.[8]

Part II of this article will explain why congressional action actually matters today as an affirmative grant of authority and a substantive restriction on the President's power to use military force. Part III will examine the scope of the current AUMF in light of its text, legislative

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[7] Of course, a new AUMF is by no means the *only* legal authority upon which the United States could base its global counterterrorism efforts; this article argues merely that such an approach is the best solution in light of the costs associated with the alternatives.

[8] Although much of the previous analysis of the AUMF has focused on its application to detention and detainee issues, this article will address the AUMF's relevance to the increasingly prevalent target killing of suspected terrorists through military and covert operations.

history, and subsequent reception. Drawing on executive branch interpretations and the Supreme Court's recent decisions, as well as the jurisprudence of the D.C. Circuit Court of Appeals, this section will demonstrate that no consensus exists about the statute's precise scope. Nevertheless, the Executive Branch has interpreted it broadly and the judiciary has in large part acquiesced to that construction. Specifically, President Obama has used expansive interpretations of terms such as "associated forces" to greatly expand his administration's international targeted killing operations, including organizations with only a tenuous link to the September 11, 2001, terrorist attacks.

Because of the proliferation of new terrorist groups with no ties to September 11, as well as the successful targeting of Al Qaeda's "core group," Part IV will argue that the AUMF's legal demise is close at hand or, with regard to certain groups, already here. As this authority wanes, Congress must reauthorize the AUMF to avoid significant consequences in both domestic and international law and policy. Simply put, should current events further vitiate the AUMF, the demands of the international system will likely force the United States to rely on legal interpretations that sap American democracy and diminish U.S. national security.

Part V outlines specific policy proposals for a reauthorization of military force against terrorist groups that reflects the current contours of the armed conflict against terrorist groups. It begins by analyzing Congress's recent efforts to reaffirm the AUMF in the 2012 National Defense Authorization Act, which ultimately failed to address the AUMF's fragile legal foundation. This section ends by arguing for a new AUMF that includes time limits, a regular review procedure, a more clearly defined geographic scope, and unambiguous target definitions, thereby avoiding excessive deference to executive branch determinations in the critical arena of targeted killing. Prolonged and systematic military action, perhaps the most consequential activity a state can undertake, should be supported by the Congress. The AUMF, passed in the uncertain days immediately following the attacks of September 11, was sufficient for its immediate purpose: preventing further attacks by those who perpetrated 9/11. The now antiquated statute, however, must be updated for the dramatically different world we face today, or else it will surely fall short of properly guaranteeing the security of the United States.

II. Does the AUMF Matter?

Some understandings of the nature and scope of executive power under the Constitution would render this article's argument—and indeed any suggestion that the AUMF limits presidential power—largely irrelevant. These approaches generally adopt an expansive view of the President's powers under the Commander in Chief Clause,[9] the Vesting Clause,[10] or both.[11] Typically, they declare that Congress "can[not] place any limits on the President's determinations as to any terrorist threat, the amount of military force to be used in response, or the method, timing,

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[9] *See, e.g.*, John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CAL. L. REV. 167, 174 (1996) ("The Framers established a system which was designed to encourage presidential initiative in war, but which granted Congress an ultimate check on executive actions."). For the argument opposing Yoo's theory, see MICHAEL J. GLENNON, CONSTITUTIONAL DIPLOMACY 81 (1990) ("[There] is no evidence that the Framers intended to confer upon the President any independent authority to commit the armed forces to combat, except in order to repel 'sudden attacks.'"); *see also* Tung Yin, *Structural Objections to the Inherent Commander-in-Chief Power Thesis*, 16 TRANSNAT'L L. & CONTEMP. PROBS. 965, 967–76 (2007) (comparing the "conventional" view that the Commander in Chief power "operates subsequent and subordinate to Congress's decision to unleash military force" with the "inherent powers" view of the Commander in Chief Clause that while Congress may defund the military, the President "enjoys the freedom to deploy and use the military as he sees fit"); Julian Davis Mortenson, *Executive Power and the Discipline of History*, 78 U. CHI. L. REV. 377, 440–41 (2011) (concluding, in a review of three of Yoo's works, that "it is all but impossible to discern what legal limits Yoo does accept on presidential action"). Indeed, some interpretations of administrative law deference principles would arrive at roughly the same result. *See* Cass R. Sunstein, *Administrative Law Goes to War*, 118 HARV. L. REV. 2663, 2671, 2671 n.67 (2005) (arguing that if "super-strong deference that derives from the combination of *Chevron* with what are plausibly taken to be his constitutional responsibilities" means "the President has clear constitutional power to do as he proposes," then "the AUMF would be irrelevant").

[10] *See, e.g.*, Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 YALE L.J. 231, 234 (2001) ("[M]ost importantly, the President enjoys a 'residual' foreign affairs power under Article II, Section 1's grant of 'the executive power.'"). For an in-depth response to the Vesting Clause Thesis, see Curtis A. Bradley & Martin S. Flaherty, *Executive Power Essentialism and Foreign Affairs*, 102 MICH. L. REV. 545, 688 (2004) ("[N]either the Vesting Clause Thesis nor executive power essentialism find any significant support—and indeed, barely any plausible mention—in the materials on which originalists typically rely—that is, materials from the Founding and from the experiences of the national and state governments in the years leading to the Founding.").

[11] *See, e.g.*, Hamdi v. Rumsfeld, 542 U.S. 507, 581, 587 (2004) (Thomas, J., dissenting) (finding that because "the Constitution vests in the President '[t]he executive Power,' provides that he 'shall be Commander in Chief of the' Armed Forces, and places in him the power to recognize foreign governments . . . the President very well may have inherent authority to detain those arrayed against our troops") (internal citations omitted).

and nature of the response . . . [because] [t]hese decisions, under our Constitution, are for the President alone to make."[12]

Unsurprisingly, this article embraces an interpretation of the Constitution that is at odds with the Vesting Clause thesis, and instead hews closer to the view expressed in Justice Robert Jackson's concurrence in the 1952 *Steel Seizure* case.[13] The Constitution explicitly empowers Congress in the area of foreign affairs to, among other actions, approve treaties,[14] declare war,[15] and regulate the armed forces.[16] These textual grants of authority would be vitiated if Congress were unable, in the exercise of these powers, to "wage a limited war; limited in place, in objects, and in time."[17] A full exposition of this oft-addressed topic is beyond the scope of this article, however, and it suffices for present purposes to merely align it with the overwhelming majority of scholars who conceive of a Constitution where Congress may authorize limited military force in a manner which is binding on the Executive Branch.[18]

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[12] Memorandum from John C. Yoo, Deputy Assistant Att'y Gen., Office of Legal Counsel, to the Deputy Counsel to the President, *The President's Constitutional Authority to Conduct Military Operations Against Terrorists and Nations Supporting Them* (Sept. 25, 2001), *available at* http://www.justice.gov/olc/warpowers925.htm ("[T]he President may deploy military force preemptively against terrorist organizations or the States that harbor or support them, whether or not they can be linked to the specific terrorist incidents of September 11."); *see also* Robert J. Delahunty & John C. Yoo, *The President's Constitutional Authority to Conduct Military Operations Against Terrorist Organizations and the Nations that Harbor or Support Them*, 25 HARV. J.L. & PUB. POL'Y 487, 487 (2002) ("[T]he President's constitutional authority to deploy military force against terrorists and the states that harbor or support them includes both the power to respond to past attacks and the power to act preemptively against future ones.").

[13] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring) ("Presidential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress.").

[14] U.S. CONST. art. II, § 2, cl. 2 ("[The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur . . . .").

[15] *Id.* art. I, § 8, cl. 11 ("Congress shall have power . . . [t]o declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water.").

[16] *Id.* art. I, § 8, cl. 14 ("Congress shall have power . . . [t]o make Rules for the Government and Regulation of the land and naval Forces.").

[17] Bas v. Tingy, 4 U.S. (4 Dall.) 37, 43 (1800) ("[I]f a partial war is waged, its extent and operation depend on our municipal laws.").

[18] *See, e.g.*, David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—A Constitutional History*, 121 HARV. L. REV. 941, 1112 (2008) (recognizing "two hundred years of historical practice" rejecting "the new and troubling claim that the President is entitled to unfettered discretion in the conduct of war"); Jules Lobel, *Conflicts Between the Commander in Chief and Congress: Concurrent Power over the Conduct of War*, 69 OHIO ST. L.J. 391, 393 (2008) ("Congress maintains the ultimate

Furthermore, the Vesting Clause thesis and all-powerful views of the Commander in Chief Clause have been rejected in large part by the judiciary[19] and the current administration.[20] Indeed, one significant reason for considering the AUMF to be an actual limit on Presidential power, and a relevant subject for legal analysis, is because that is how the Obama Administration understands the statute. State Department Legal Adviser Harold Koh, in his March 25, 2010, speech to the

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authority to decide the methods by which the United States will wage war. The President can direct and manage warfare, however, the only Commander in Chief power that Congress cannot override is the President's power to command: to be, in Alexander Hamilton's words, the nation's 'first General and Admiral.'") (internal citation omitted); Letter from David J. Barron, Professor, Harvard Law Sch. et al., to Harry Reid, Majority Leader, U.S. Senate et al. 5 (Jan. 17, 2007), *available at* www.law.duke.edu/features/pdf/congress_power_letter.pdf ("Wherever one comes down on the outer limits of legislative war powers, *Little v. Barreme* and *Bas v. Tingy* make clear that Congress retains substantial power to define the scope and nature of a military conflict that it has authorized, even where these definitions may limit the operations of troops on the ground.").

[19] *See, e.g.*, Hamdi v. Rumsfeld, 542 U.S. 507, 552 (2004) (Souter, J., concurring in part, dissenting in part, and concurring in the judgment) (noting the "weakness of the Government's mixed claim of inherent, extrastatutory authority under a combination of Article II of the Constitution and the usages of war").

[20] *See, e.g.*, John C. Dehn, *The Commander-in-Chief and the Necessities of War: A Conceptual Framework*, 83 TEMP. L. REV. 599, 601 (2011) ("The courts have rejected, and a new Administration has abandoned . . . claims that the President has complete discretion to fight the nation's armed conflicts in any manner the President deems expedient."). Of course, the Obama Administration's rejection of strong presidential powers has been far from universal. Indeed, the current administration has embraced broad executive authority in a wide array of situations. *See, e.g.*, Charlie Savage, *In G.O.P. Field, Broad View of Presidential Power Prevails*, N.Y. TIMES, Dec. 29, 2011, http://www.nytimes.com/2011/12/30/us/politics/gop-field-has-broad-views-on-executive-power.html (noting President Obama's policy that he had the "inherent constitutional power" to "deploy[] the American military to join NATO allies in airborne attacks on Libyan government forces" "because he could 'reasonably determine that such use of force was in the national interest"); Jeremy B. White, *So Far, Obama More Like Bush, Than Carter, on War Powers Authority*, INT'L BUS. TIMES, June 23, 2011, http://www.ibtimes.com/articles/168306/20110623/obama-libya-libya-resolution-yemen-strikes-obama-yemen.htm ("[President Obama] has come under fire for invoking the state secrets privilege to block government actions from being revealed in court, for authorizing the assassination of terrorism suspects even if they are U.S. citizens, and for continuing the practice of indefinitely detaining terror suspects without trial."); Edwin Meese III & Todd Gaziano, *Obama's Recess Appointments Are Unconstitutional*, WASH. POST, Jan. 5, 2012, http://www.washingtonpost.com/opinions/obamas-recess-appointments-are-unconstitutional/2012/01/05/gIQAnWRfdP_story.html ("President Obama's attempt to unilaterally appoint three people to seats on the National Labor Relations Board and Richard Cordray to head the new Consumer Financial Protection Bureau . . . is a breathtaking violation of the separation of powers and the duty of comity that the executive owes to Congress.").

American Society of International Law, clarified that "as a matter of domestic law" the Obama Administration relies on the AUMF for its authority to detain and use force against terrorist organizations.[21] Furthermore, Koh specifically disclaimed the previous administration's reliance on an expansive reading of the Constitution's Commander in Chief Clause.[22] Roughly stated, the AUMF matters, at least in part, because the Obama Administration says it matters.

The scope of the AUMF is also important for any future judicial opinion that might rely in part on Justice Jackson's *Steel Seizure* concurrence.[23] Support from Congress places the President's actions in Jackson's first zone, where executive power is at its zenith, because it "includes all that he possesses in his own right plus all that Congress can delegate."[24] Express or implied congressional disapproval, discernible by identifying the outer limits of the AUMF's authorization, would place the President's "power . . . at its lowest ebb."[25] In this third zone, executive claims "must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system."[26] Indeed, Jackson specifically rejected an overly powerful executive, observing that the Framers did not intend to fashion the President into an American monarch.[27]

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[21] Harold Hongju Koh, Legal Adviser, U.S. Dep't of State, The Obama Administration and International Law, Address Before the Annual Meeting of the American Society of International Law (Mar. 25, 2010), *available at* http://www.state.gov/s/1/releases/remarks/139119.htm (last visited June 24, 2012).

[22] *Id.* ("First, as a matter of domestic law, the Obama Administration has not based its claim of authority to detain those at GITMO and Bagram on the President's Article II authority as Commander-in-Chief. Instead, we have relied on legislative authority expressly granted to the President by Congress in the 2001 AUMF."); *see also* Respondent's Memorandum Regarding The Government's Detention Authority Relative to Detainees Held at Guantánamo Bay, *In re* Guantánamo Bay Detainee Litigation, Misc. No. 08-442, at 1, 3 (D.D.C. Mar. 13, 2009), *available at* http://www.justice.gov/opa/documents/memo-re-det-auth.pdf (announcing that the Obama Administration's "refin[ed] position with respect to its authority to detain those persons who are now being held at Guantanamo Bay" is "derived from the AUMF").

[23] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635–38 (1952) (Jackson, J., concurring).

[24] *Id.* at 636.

[25] *Id.* at 637.

[26] *Id.* at 638.

[27] *Id.* at 641 ("The example of such unlimited executive power that must have most impressed the forefathers was the prerogative exercised by George III, and the description of its evils in the Declaration of Independence leads me to doubt that they were creating their new Executive in his image.").

Jackson's concurrence has become the most significant guidepost in debates over the constitutionality of executive action in the realm of national security and foreign relations.[28] Indeed, some have argued that it was given "the status of law"[29] by then-Associate Justice William Rehnquist in *Dames & Moore v. Regan*.[30] Speaking for the Court, Rehnquist applied Jackson's tripartite framework to an executive order settling pending U.S. claims against Iran, noting that "[t]he parties and the lower courts . . . have all agreed that much relevant analysis is contained in [*Youngstown*]."[31] More recently, Chief Justice John Roberts declared that "Justice Jackson's familiar tripartite scheme provides the accepted framework for evaluating executive action in [the area of foreign relations law]."[32] Should a future court adjudicate the nature or extent of the President's authority to engage in military actions against terrorists, an applicable statute would confer upon such executive action

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[28] *See, e.g.*, Adam J. White, *Justice Jackson's Draft Opinions in the Steel Seizure Cases*, 69 ALB. L. REV. 1107, 1107 (2006) ("As the nation debates the Constitution's limits on executive action in the global war on terror, Justice Jackson's opinion has grown ubiquitous in legal discourse."); Sarah H. Cleveland, Hamdi *Meets* Youngstown*: Justice Jackson's Wartime Security Jurisprudence and the Detention of "Enemy Combatants*," 68 ALB. L. REV. 1127, 1128 (2005) (noting that "[i]t is impossible to exaggerate the significance of Justice Jackson's concurrence in Youngstown for U.S. foreign relations jurisprudence" and that "Jackson's concurrence . . . established the starting framework for analyzing all future foreign relations and individual liberties problems").

[29] Michael J. Glennon, *Two Views of Presidential Foreign Affairs Power:* Little v. Barreme *or* Curtiss-Wright*?*, 13 YALE J. INT'L L. 5, 19 (1988). *See also* Stephen I. Vladeck, *Foreign Affairs Originalism in* Youngstown*'s Shadow*, 53 ST. LOUIS U. L.J. 29, 35 (2008) ("[Jackson's] opinion was later effectively adopted by the Supreme Court in Dames & Moore v. Regan, where then-Justice Rehnquist described Jackson's framework as 'analytically useful.'"). This characterization of *Dames & Moore*, however, is disputed by others, who argue that "Justice Rehnquist's statutory interpretation in *Dames & Moore* radically undercuts *Youngstown*'s vision of a balanced national security process." Harold Hongju Koh, *Why the President (Almost) Always Wins in Foreign Affairs: Lessons of the Iran-Contra Affair*, 97 YALE L.J. 1255, 1311 (1987) ("[*Dames & Moore* has the] effect of dramatically narrowing Jackson Category Three to those very few foreign affairs cases in which the President both lacks inherent constitutional powers and is foolish enough to act contrary to congressional intent clearly expressed on the face of a statute."); *see also* Cleveland, *supra* note 28, at 1138 ("Jackson's analysis was badly abused in *Dames & Moore v. Regan*, where the Court found that Congress, through acquiescence, had impliedly authorized the President's power to terminate the claims of U.S. nationals against Iran."); Roy E. Brownell II, *The Coexistence of* United States v. Curtiss-Wright *and* Youngstown Sheet & Tube v. Sawyer *in National Security Jurisprudence*, 16 J.L. & POL. 1, 68 (2000) (arguing that *Dames & Moore* "talks like *Youngstown*, but walks like *Curtiss-Wright*").

[30] 453 U.S. 654 (1981).

[31] *Id.* at 668.

[32] Medellin v. Texas, 552 U.S. 491, 494 (2008).

"the strongest of presumptions and the widest latitude of judicial interpretation."[33] The AUMF therefore exercises a profound legal influence on the future of the United States' struggle against terrorism, and its precise scope, authorization, and continuing vitality matter a great deal.

III. What Does the AUMF Authorize?

On September 14, 2001, in response to the terrorist attacks of September 11, Congress passed the AUMF.[34] President Bush signed it into law on September 18, declaring that Congress's actions showed that "[o]ur whole Nation is unalterably committed to a direct, forceful, and comprehensive response to these terrorist attacks and the scourge of terrorism directed against the United States and its interests."[35] Rather than seeking to address an act of mass criminality, the Bush Administration adopted an explicit "war paradigm" in the United States' conflict with the perpetrators of 9/11.[36]

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[33] *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring). Indeed, Justice Jackson's tripartite approach to presidential authority in foreign affairs and national security, now nearly 60 years old, is alive and well in the Supreme Court's jurisprudence, accepted by nearly all of the current justices. *See* Hamdan v. Rumsfeld, 548 U.S. 557, 593 n.23 (2006) (holding that the President "may not disregard limitations that Congress has, in proper exercise of its own war powers, placed on his powers" (citing *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring))); *Youngstown*, 343 U.S. at 638 (Kennedy, J., concurring) ("The proper framework for assessing whether executive actions are authorized is the three-part scheme used by Justice Jackson in his opinion in *Youngstown Sheet & Tube Co. v. Sawyer*.") (citation omitted); *id.* at 680 (Thomas, J., dissenting) ("When the President acts pursuant to an express or implied authorization from Congress, his actions are supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion . . . rest[s] heavily upon any who might attack it." (citing *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring)) (internal quotation marks omitted)). *See also* Neal Kumar Katyal, Hamdan v. Rumsfeld: *The Legal Academy Goes to Practice*, 120 HARV. L. REV. 65, 99 (2006) ("Both then-Judge Roberts and then-Judge Alito professed extreme reverence for [Justice Jackson's] framework at their confirmation hearings.").

[34] S.J. Res. 23, 107th Cong. (2001).

[35] President George W. Bush, Statement by The President after Signing Authorization for Use of Military Force Bill, September 18, 2001, *available at* http://georgewbush-whitehouse.archives.gov/news/releases/2001/09/20010918-10.html.

[36] For a defense of President Bush's invocation of the armed conflict paradigm, see BENJAMIN WITTES, LAW AND THE LONG WAR: THE FUTURE OF JUSTICE IN THE AGE OF TERROR 45 (2008) ("[T]reating the conflict as a legal war offered maximal operation flexibility. The model provided a recognized framework for American forces to bomb Taliban positions, a framework under which they could also legitimately kill Al Qaeda and Taliban operatives in battle. It also allowed the military to detain such people and

In the weeks after September 11, 2001, no one seriously questioned[37] the President's authority to prosecute what he called the "War on Terror."[38] President Bush found that the Taliban had harbored and supported Al Qaeda,[39] and therefore had "aided the terrorist attacks that occurred on September 11, 2001."[40] Although the scope of the military force authorized by the AUMF was sufficiently clear in October 2001, that is no longer the case today. Most prominently, it is unclear if the AUMF permits targeted killings in Pakistan and Yemen of groups with only loose affiliations with Al Qaeda. Indeed, because of the statute's specific reference to the 9/11 attacks, it is nearing obsolescence. This section will examine the text and legislative history of the AUMF in order to inform an analysis of its scope. It will then describe the AUMF's subsequent interpretation in the Executive Branch and treatment by the judiciary branch. Through a combination of broad executive branch interpretations and judicial acquiescence, the statute has provided justification for an expansive use of military force abroad pursuant to the armed conflict against international terrorists. Finally, despite the absence of a consensus on the AUMF's precise scope, the evidence compels the conclusion that the AUMF will soon prove insufficient to legally authorize the United States' global counterterrorism efforts.

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interrogate them long term. . . . In the short term, war was the only way to invoke the full range of presidential powers that George W. Bush wished to bring to bear on Al Qaeda—and that any other president would likewise have wanted to invoke.").

[37] *See, e.g.*, *id.* at 44 ("At the outset of the conflict, the [war-based] model presented relatively little controversy."); *see also Afghanistan Wakes After Night of Intense Bombings*, CNN.COM, Oct. 7, 2001, *available at* http://archives.cnn.com/2001/US/10/07/gen.america.under.attack/ (describing the U.S.-British attacks throughout Afghanistan and not addressing the legal basis for the attack).

[38] This phrase is normally attributed to President Bush's September 20, 2001, speech. President George W. Bush, Address to Joint Session of Congress, Sept. 20, 2001, *available at* http://www.washingtonpost.com/wp-srv/nation/specials/attacked/transcripts/bushaddress_092001.html ("Our war on terror begins with Al Qaeda, but it does not end there. It will not end until every terrorist group of global reach has been found, stopped and defeated."). It is unclear, however, whether President Bush was asserting that the United States was at that moment in an armed conflict with Al Qaeda or merely employing a rhetorical technique similar to the "War on Drugs" and the "War on Poverty."

[39] *Id.* ("[The Taliban] is threatening people everywhere by sponsoring and sheltering and supplying terrorists. By aiding and abetting murder, the Taliban regime is committing murder.").

[40] Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(a), 115 Stat. 224 (2001).

A. September 18, 2001, AUMF—Text and Legislative History

The AUMF is divided into three parts: five preambulatory clauses, one section delineating the granted authority, and one section placing the authorization within the rubric of the War Powers Resolution.[41]

In pertinent part, the AUMF authorizes the President

> to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.[42]

The AUMF—proposed, debated, and passed within three days[43]—is most cogently analyzed based on five reference points: object, method, time, place, and purpose.[44]

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[41] *Id.*

[42] *Id.* § 2(a).

[43] Congress bypassed the normal committee procedure to move more quickly and placed the House Speaker and Senate Majority Leader in charge of negotiations. Because of this expedited process, "no formal reports on this legislation were made by any committee of either the House or the Senate." RICHARD F. GRIMMETT, CONG. RESEARCH SERV., RS 22357, AUTHORIZATION FOR USE OF MILITARY FORCE IN RESPONSE TO THE 9/11 ATTACKS (P.L. 107-40): LEGISLATIVE HISTORY 2 (2007); *see also* David Abramowitz, *The President, The Congress, and Use of Force: Legal and Political Considerations in Authorizing Use of Force Against International Terrorism*, 43 HARV. INT'L L.J. 71, 78 (2002) ("Rapid consideration of the use of force authorization embodied in S.J. Res. 23, conceived on the afternoon of September 12 and passed by the Senate on the morning of September 14, did not allow much time for reflection . . . .").

[44] These five elements draw upon those used in other articles analyzing the AUMF. *See* Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047, 2072 (2005) ("For purposes of [historical] comparison, these authorizations [of military force] can be broken down into five analytical components: (1) the authorized military resources; (2) the authorized methods of force; (3) the authorized targets; (4) the purpose of the use of force; and (5) the timing and procedural restrictions on the use of force.").

1. Object: Who Is the Target?

The AUMF authorizes force against "those nations, organizations, or persons [who] planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001." Perhaps the most important interpretive issue is whether the AUMF's authority extends to terrorists that did not play a part in the 9/11 terrorist attacks.[45] The text itself is clear that Congress did not authorize the President to use "military action against terrorists generally."[46] Participants noted that a "consensus quickly developed that the authority should be limited to those responsible for the September 11 attacks."[47] Indeed, the adopted text contrasts with the White House's proposed language, which would have authorized not only "all necessary and appropriate force" against those responsible for 9/11, but also military force generally "to deter and pre-empt any future acts of terrorism or aggression against the United States."[48] Because of the broad scope of this language, it "was strongly opposed by key legislators in Congress and was not included in the final version of the legislation that was passed."[49]

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[45] I do not question Congress's power to authorize military force abroad against non-state actors. *See also* 147 CONG. REC. H5640 (daily ed. Sept. 14, 2001) (statement by Rep. Ron Paul) (stating that Congress "declare[d] war against a group that is not a country"). Since the earliest days of U.S. history, it has been understood that Congress can authorize the use of "particular armed forces in a specified way for limited ends" against non-state actors. Bradley & Goldsmith, *supra* note 44, at 2073–74 (describing limited U.S. military force authorizations against, among other groups, "Indians" and "slave traders and pirates"). Of course, authorizing military force against non-state actors within the United States is a far more complex matter, on which the AUMF itself is far from clear. *See infra* Part III.A.4.

[46] GRIMMETT, *supra* note 43, at 3 ("Congress limited the scope of the President's authorization to use U.S. military force through P.L. 107-40 to military actions against only those international terrorists and other parties directly involved in aiding or materially supporting the September 11, 2001 attacks on the United States. The authorization was not framed in terms of use of military action against terrorists generally.").

[47] Abramowitz, *supra* note 43, at 74. *See also* Bradley & Goldsmith, *supra* note 44, at 2108 ("If an individual had no connection to the September 11 attacks, then he is not covered as a 'person' under the AUMF even if he subsequently decides to commit terrorist acts against the United States.").

[48] GRIMMETT, *supra* note 43, at 5–6.

[49] *Id.* at 2–3 ("This language would have seemingly authorized the President, without durational limit, and at his sole discretion, to take military action against any nation, terrorist group or individuals in the world without having to seek further authority from the Congress. It would have granted the President open-ended authority to act against all terrorism and terrorists or potential aggressors against the United States anywhere, not just the authority to act against the terrorists involved n the September 11, 2001 attacks, and those nations, organizations and persons who had aided or harbored the terrorists.").

Contemporaneous congressional statements corroborate this textual understanding. A typical description of the AUMF in Congress was of a "joint resolution authorizing the use of military force against those responsible for the September 11, 2001 terrorist acts against our country."[50] Although members of Congress variously praised and criticized the resolution's language for its singular focus on those responsible for 9/11, they uniformly understood the AUMF not to authorize a general "war on terrorism" but only a war against *certain terrorists*.[51] In sum, the AUMF is "broad, but . . . not unlimited."[52]

2. Method: What Actions May the President Take?

The AUMF authorizes the President to "use all necessary and appropriate force";[53] neither its text nor its structure explicitly constrains the means that it authorizes. The statute's reference to "force" clearly means military force and thus encompasses the use of lethal force.[54]

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[50] *See, e.g.*, 147 CONG. REC. H5647 (daily ed. Sept. 14, 2001) (statement of Rep. Joseph Knollenberg).

[51] *Compare* 147 CONG. REC. H5649 (daily ed. Sept. 14, 2001) (statement of Rep. John Spratt) ("These words have large scope. We do not know for sure who the enemy is, where he may be found, or who may be harboring him. Congress is giving the President the authority to act before we have answers to these basic questions because we cannot be paralyzed. We need to answer this treacherous attack upon our people on our soil, and that is why we grant the President this broad grant of authority."), *and* CONG. REC. H5642 (daily ed. Sept. 14, 2001) (statement of Rep. Eleanor Holmes Norton) ("[T]he language before us is limited only by the slim anchor of its September 11 reference, but allows war against any and all prospective persons and entities."), *with* 147 CONG. REC. H5654 (daily ed. Sept. 14, 2001) (statement of Rep. Lamar Smith) ("[T]his joint resolution is well intended, but it does not go far enough [because it] should have authorized the President to attack, apprehend, and punish terrorists whenever it is in the best interests of America to do so. . . . [Instead, this resolution] ties the President's hands and allows only the pursuit of one individual and his followers and supporters."), *and* 147 CONG. REC. H5643 (daily ed. Sept. 14, 2001) (statement of Rep. Howard Berman) ("[T]his is not just about bin Laden. There are other radical groups that engage in terrorism [and to] win the war against terrorism, we must eliminate the entire infrastructure that sustains these organizations.").

[52] 147 CONG. REC. H5671 (daily ed. Sept. 14, 2001) (statement of Rep. Mark Udall) ("It covers the culpable but it is not aimed at anyone else.").

[53] Those present during negotiations apparently felt that the word "all" immediately preceding "necessary and appropriate force" did not alter the authority granted. Abramowitz, *supra* note 43, at 75 ("[I]t was quickly agreed that whether ['all'] was included or not was of very little substantive effect.").

[54] The Supreme Court subsequently interpreted "necessary and appropriate force" as including authority for military detention. Hamdi v. Rumsfeld, 542 U.S 507, 517 (2004) (plurality opinion) ("We conclude that detention of individuals falling into the limited

Even if there existed any ambiguity about the word "force" in Section (a), the statute's name clearly contemplates the use of *military* force.[55]

The modifiers "necessary and appropriate," however, do appear to have some limiting effect, especially when read together with the AUMF's preamble. The force the President employs could accordingly only be that which is "necessary and appropriate" to "prevent any future acts of international terrorism against the United States by such nations, organizations or persons." Force that went beyond that required to prevent future attacks would be unauthorized. According to this construction, if the United States had, for example, responded to the 9/11 attacks by reverting to the World War II-era practice of indiscriminate carpet bombing, that action would have been *ultra vires* as beyond that which was "necessary and appropriate" to prevent future terrorist attacks.[56]

3. Time: How Long Does Authorization Last?

Although the AUMF's text includes no express temporal element, such an element is implicit in the statute's reference to "the terrorist attacks that occurred on September 11, 2001." Constructively, therefore, it is nearly impossible for the AUMF to last forever. Indeed, the only member of Congress to address this issue, then Chairman of the Senate Foreign Relations Committee Joe Biden, explicitly rejected a time limit while referring to September 11, 2001.[57] Furthermore, the only member of either house of Congress to oppose the AUMF, Congresswoman Barbara Lee of California, opposed the AUMF precisely because it authorized military force "anywhere, in any country, . . . and *without*

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category we are considering, for the duration of the particular conflict in which they were captured, is so fundamental and accepted an incident to war as to be an exercise of the 'necessary and appropriate force' Congress has authorized the President to use.").

[55] Even if this were not sufficient, the AUMF's explicit reference to the War Powers Resolution in Section 2(b) supports the inference that lethal force is authorized. *See* AUMF, *supra* note 40, § 2(b).

[56] Of course, such a bombing campaign would also almost certainly violate the *jus in bello* requirements of necessity, distinction, and proportionality. *See* Laurie R. Blank, *After "Top Gun": How Drone Strikes Impact the Law of War*, 33 U. PA. J. INT'L L. 675, 681-83 (2012). This point, however, is beyond the scope of this article.

[57] 147 CONG. REC. S9422-23 (daily ed. Sept. 14, 2001) ("[The AUMF] does not limit the amount of time that the President may prosecute this action against the parties guilty for the September 11 attacks.").

time limit."[58] Congress's authorization contemplated an indefinite effort to destroy the threat posed by those responsible for the September 11, 2001, attacks. Although the context of subsequent events could certainly sap the continuing vitality of the AUMF—including, for example, the elimination of those responsible for 9/11—the mere passage of time, without any other factors, does not vitiate Congress's authorization.

4. Place: Where May "Organizations or Persons" Be Targeted?

The fourth issue that arises in examining the AUMF's scope is that of geographic scope. This issue can be further sub-divided into two parts: first, whether any region or state lies beyond the reach of the AUMF; and second, whether the AUMF authorizes force within the territory of the United States itself. The text itself includes no geographic reference point, and a straightforward application of the *ejusdem generis* canon of statutory construction to "nations, organizations, or persons" yields no common geographic characteristic. In fact, the three potential targets are dissimilar—"nations" have fixed geographic locations, "organizations" can exist geographically (but need not),[59] and "persons" exist in physical form but are anything but fixed in geography.

The AUMF's language does not limit the use of force to any particular region or country. Nor does it explicitly exclude any specific country. Moreover, given the lack of specific knowledge on September 14, 2001, about who was behind the September 11 attacks, it would have

[58] Congresswoman Barbara Lee, *Why I Opposed the Resolution to Authorize Force*, S.F. CHRON., Sept. 23, 2011 (emphasis added), *available at* http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2001/09/23/INLEE.DTL. *But see* GRIMMETT, *supra* note 43, at 2–3 (noting that "the proposed White House draft resolution was strongly opposed by key legislators in Congress and was not included in the final version" because its language was, *inter alia*, "without durational limit").

[59] It is important to note that targeting an "organization" can mean targeting the organization's members, its command structure, its headquarters, or its assets. In this case, because Al Qaeda has no headquarters or major assets, targeting it amounts to targeting its members and structure. In addition, an organization could itself be destroyed without the elimination of all of its members. In such a case, the remaining individuals of the defunct organization could only be targeted if it would be "necessary and appropriate" to prevent future attacks against the United States. If the remaining individuals posed no threat, the AUMF would not authorize force against them. If they continued to pose a threat, however, their lack of a continued organizational affiliation would not place them beyond the AUMF's reach. Because of the overlapping authorization in the AUMF, even Al Qaeda's complete demise as an organization would not, *ipso facto*, mean that the United States could not target its (now former) members.

been puzzling for Congress to have authorized military action against the perpetrators, but only if they were in certain countries. Indeed, the congressional debate was replete with references to the AUMF's "worldwide" scope[60] and Congress's targeting of "terrorism wherever it exists on earth."[61]

The AUMF's domestic applicability is less clear. Although the AUMF does not explicitly preclude any particular country, it would seem to implicitly exclude the United States itself, because it would be nonsensical for the United States to attack itself as a nation. The AUMF's applicability to "organizations" and "persons" within the United States, however, is a closer call.[62] The AUMF's text does not limit the use of force geographically, a conclusion that is strengthened in light of previous use of force authorizations' explicit geographic limitations.[63] Indeed, the attacks of September 11, 2001, although originating from abroad, were launched from Boston, Newark, and Washington, DC.[64] Congress itself, in the AUMF's second "whereas" clause, declared that "such acts render it both necessary and appropriate that the United States exercise its rights to self-defense and to protect United States citizens both *at home* and abroad."[65] Moreover, it is

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[60] *E.g.*, 147 CONG. REC. H5658 (daily ed. Sept. 14, 2001) (statement of Rep. John Shadegg).

[61] 147 CONG. REC. H5653 (daily ed. Sept. 14, 2001) (statement of Rep. John Tanner).

[62] *Compare* Bradley & Goldsmith, *supra* note 44, at 2117 (finding that "the AUMF authorizes the President to use force anywhere he encounters the enemy covered by the AUMF, including the United States"), *and* Memorandum from John C. Yoo, Deputy Assistant Att'y Gen., Office of Legal Counsel, to Alberto R. Gonzales, Counsel to the President, Authority for Use of Military Force to Combat Terrorist Activities Within the United States 15 (Oct. 23, 2001), *available at* http://www.justice.gov/olc/docs/memo militaryforcecombatus10232001.pdf ("[The AUMF] supplies the congressional authorization for the domestic use of military force."), *with* Abramowitz, *supra* note 43, at 75 ("[I]n the debate on this statute, several key members of Congress clearly indicated that this resolution was intended to authorize use of force abroad.").

[63] Bradley & Goldsmith, *supra* note 44, at 2117 n.313 (comparing the AUMF to prior use of force authorizations).

[64] Linda J. Demaine & Brian Rosen, *Process Dangers of Military Involvement in Civil Law Enforcement: Rectifying the Posse Comitatus Act*, 9 N.Y.U. J. LEGIS. & PUB. POL'Y 167, 199 n.134 (2006) ("Because it has been determined that Al Qaeda planned and committed the September 11th attacks, the joint resolution may authorize the President to use military force against all persons who are members of Al Qaeda, whether within or without the territory of the United States.").

[65] AUMF, *supra* note 40 (emphasis added). *See also* Bradley & Goldsmith, *supra* note 44, at 2117–18.

unlikely that preexisting constitutional understandings or statutory law would preclude reading the AUMF to provide such an authorization.[66]

On the other hand, however, the accounts of participants generally foreclosed any domestic application for the AUMF. The congressional debate generally assumed that the AUMF was not an authorization of force within U.S. borders.[67] In 2005, former Senate Majority Leader Tom Daschle, responding to the breaking news of President Bush's use of warrantless wiretapping against U.S. citizens, maintained that the AUMF's negotiators had explicitly rejected its application to the United States.[68] In addition, no geographic modifier, such as "abroad," was

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[66] Although the Posse Comitatus Act of 1878 is often thought to categorically bar military operations within the United States, the prohibition is more nuanced. The Posse Comitatus Act bars only the military's deployment "as a posse comitatus or otherwise to execute the laws." 18 U.S.C. § 1385 (Suppl. 2006). The statute is generally considered to "prohibit[] the military from executing the civil law" or acting as a law enforcement agency, but "[i]t does not prohibit the military from responding to situations that call for homeland defense." Demaine & Rosen, *supra* note 64, at 180. Difficult lines exist, however, between law enforcement and military action or homeland defense. *See* Christopher J. Schmidt & David A. Klinger, *Altering the Posse Comitatus Act: Letting the Military Address Terrorist Attacks on U.S. Soil*, 39 CREIGHTON L. REV. 667, 673 (2006) ("The fact that there is no bright line between criminal acts and acts of war presents a pair of problems when it comes to mobilizing the military to defeat terrorist attacks."). Finally, however, any problems the Posse Comitatus Act might pose for domestic application of the AUMF are disposed of through the Act's exceptions clause, which expressly excludes "cases and under circumstances expressly authorized by the Constitution or Act of Congress." 18 U.S.C. § 1385. Therefore, even if the actions undertaken were deemed law enforcement, rather than military, the AUMF would likely function as an express statutory authorization. *See* Demaine & Rosen, *supra* note 64, at 199 (noting that while "no court has decided whether the [AUMF] constitutes a PCA exception," in "a situation . . . involving individuals connected with the September 11th attacks or otherwise connected with Al Qaeda that . . . calls for only a civil response," "the joint resolution appears to authorize the President to use the military to execute the law against those individuals").

[67] *See, e.g.*, 147 CONG. REC. S9423 (daily ed. Sept. 14, 2001) (statement of Sen. Joseph Biden) ("[I]t should go without saying . . . that the resolution is directed *only* at using force abroad to combat acts of international terrorism.") (emphasis added); 147 CONG. REC. H5639 (daily ed. Sept. 14, 2001) (statement of Rep. Tom Lantos) ("The resolution before us empowers the President to bring to bear the full force of American power *abroad* in our struggle against the scourge of international terrorism.") (emphasis added). A single Member of Congress, Representative Jesse Jackson, Jr., pointed out that the AUMF "could be interpreted, if read literally, to give the President the authority to deploy or use our armed forces domestically." 147 CONG. REC. H5675 (daily ed. Sept. 14, 2001).

[68] Tom Daschle, *Power We Didn't Grant*, WASH. POST, Dec. 23, 2005, http://www.washingtonpost.com/wp-dyn/content/article/2005/12/22/AR2005122201101.html ("Literally minutes before the Senate cast its vote, the administration sought to add the

added after the phrase "necessary and appropriate force" because this addition "was arguably unnecessary in light of the references in section 2(b) of the joint resolution to the War Powers Resolution (WPR), which generally deals with introducing U.S. forces abroad."[69] Although it seems unlikely that the U.S. military would execute lethal drone strikes against suspected terrorists within the territory of the United States, it is unclear that this is foreclosed by the AUMF.[70]

5. Purpose: Why May They Be Targeted?

The AUMF authorizes the President to use force against those "nations, organizations, or persons he determines planned, authorized, committed, or aided" the September 11 attacks "in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons."[71] This element, however, is ambiguous—the AUMF's "in order to" clause could function as a limiting clause or merely as a hortatory statement of policy. The former interpretation would appear to exhibit a preventive aim, limiting the actions taken under the AUMF to those necessary to prevent future terrorist attacks. In other words, this reading of the AUMF would seem to authorize *only* preventive military action, which is further limited to those terrorist organizations that played some role—through direct

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words 'in the United States and' after 'appropriate force' in the agreed-upon text. This last-minute change would have given the president broad authority to exercise expansive powers not just overseas—where we all understood he wanted authority to act—but right here in the United States, potentially against American citizens. I could see no justification for Congress to accede to this extraordinary request for additional authority. I refused."). Indeed, Daschle argues that the Bush Administration itself didn't believe that the AUMF authorized military actions in the United States because "at the time, the administration clearly felt they weren't [included] or it wouldn't have tried to insert the additional language." *Id.*

[69] Abramowitz, *supra* note 43, at 75. For the counterargument to Abramowitz's position, see Bradley & Goldsmith, *supra* note 44, at 2118 n.316 (noting that Abramowitz's interpretation of the War Powers Resolution is "incorrect [because] [t]he War Powers Resolution addresses every situation in which the President introduces U.S. armed forces 'into hostilities' and it expressly contemplates a situation [that] Congress is unable to meet because of 'an armed attack upon the United States'") (internal citations omitted).

[70] The use of lethal military force within the territory of the United States would raise myriad legal issues, including the application of the Fourth Amendment and due process under the Fifth and Fourteenth Amendments, as well as possibly the Posse Comitatus Act, which are beyond the scope of this article. For a brief discussion of these issues, see Bradley & Goldsmith, *supra* note 44, at 2120 n.325; *see also supra* note 66 (discussing the Posse Comitatus Act).

[71] AUMF, *supra* note 40, § 2(a).

involvement or by indirectly aiding those directly responsible—in the September 11 attacks.[72] The legislative history supports this inference—members of Congress argued that the AUMF empowered the President only to prevent further acts of terrorism against the United States.[73]

An alternative interpretation is that the "in order to" clause is hortatory only—it merely states a rhetorical and policy goal. Some participant accounts corroborate this understanding, rejecting this provision's limiting power and maintaining that its inclusion has no domestic legal effect.[74] According to this account, the AUMF's "in order to" clause was included to satisfy the pro forma requirements of international law—chiefly, the international law prohibition against reprisals—but was not actually a substantive limit on the President's power to use force against those who perpetrated or who indirectly supported the September 11, 2001, attacks. Thus it is unclear what limit, if any, the AUMF's ostensible preventive purpose imposes on the President.

B. The AUMF in Practice: Executive and Judicial Interpretations

Understanding the reach of the AUMF requires analyzing not just the statute itself, but also its subsequent reception by the other branches of government. In interpreting the statute's parsimonious language, the executive and judicial branches have engaged in an iterative process which has resulted in the currently accepted broad understanding of those who may be targeted pursuant to the AUMF.

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[72] Of course, military action under such circumstances could arguably rely not on the AUMF, but on the international legal right of self-defense, U.N. Charter art. 51 ("Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations . . . ."), or the President's "power to repel sudden attacks." 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 318 (Max Farrand ed., 1911) (1787).

[73] *See, e.g.*, 147 CONG. REC. S9422 (daily ed. Sept. 14, 2001) (statement of Sen. Joseph Biden) ("In short, the President is authorized to go after those responsible for the barbaric acts of September 11, 2001 to ensure that those same actors do not engage in additional acts of international terrorism against the United States.").

[74] Abramowitz, *supra* note 43, at 75 ("While one might argue that it is a limitation on the use of force, the preventive aim actually corresponds to international legal standards that forbid retaliation but accept prevention as a legal basis for the use of force."). According to Abramowitz, the drafters recognized that reprisals were unlawful under international law and sought to avoid this legal issue by including the prevention wording. *Id.* at 75 n.15 (citing IAN BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 431 (1963)).

The Bush Administration initially construed broadly membership in the "organizations" that planned the September 11, 2001, attacks. An "enemy combatant,"[75] according to the Executive Branch in 2004,

> shall mean an individual who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. This includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces.[76]

Courts noted that "[u]se of the word 'includes' indicates that the government interprets the AUMF to permit the indefinite detention of individuals who never committed a belligerent act or who never directly supported hostilities against the U.S. or its allies."[77] The Supreme

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[75] Because of the Bush Administration's early reliance on the President's Article II powers, it is unclear that the phrase "enemy combatant" is coextensive with the Bush Administration's understanding of those individuals covered by the AUMF. *See* Hamdi v. Rumsfeld, 542 U.S. 507, 516 (2004) (plurality opinion) ("[T]he Government has never provided any court with the full criteria that it uses in classifying individuals as ['enemy combatants']."). The Bush Administration's brief in *Hamdi* relied principally on the President's powers as Commander in Chief, only secondarily invoking the AUMF. Brief for Respondent at 13, Hamdi v. Rumsfeld, 542 U.S. 507 (2004) (No. 03-6696) (arguing that the President's "authority to vanquish the enemy and repel foreign attack in time of war . . . is fully engaged with respect to the armed conflict that the United States is now fighting against the al Qaeda terrorist network and its supporters in the mountains of Afghanistan and elsewhere [and] is supported by the statutory backing of Congress"). The government's brief, however, indicated that it understood Congress's authorization as encompassing "the President's use of 'all necessary and appropriate force' in connection with the current conflict," including "capturing and detaining enemy combatants." *Id.* at 20 (internal citation omitted). Additionally, the Bush Administration's use of "enemy combatant" conflated two groups—those fighting *lawfully* (lawful enemy combatants) and those fighting *illegally* (unlawful enemy combatants). Unlawful combatants, or unprivileged belligerents, can be tried for their crimes; lawful combatants, or privileged belligerents, are participating in an "internationally legal" war and must be held as prisoners of war. *See generally* Mary Ellen O'Connell, *Combatants and the Combat Zone*, 43 U. RICH. L. REV. 845, 851–52 (2009) (comparing the legal meaning of different terms used to describe those who take part in armed conflicts).

[76] Memorandum from Paul Wolfowitz, Deputy Sec'y of Def., to Gordon R. England, Sec'y of the Navy 1 (July 7, 2004), *available at* http://www.defenselink.mil/news/Jul 2004/d20040707review.pdf.

[77] *In re* Guantanamo Detainee Cases, 355 F. Supp. 2d 443, 475 (D.D.C. 2005). The Bush Administration even argued, in response to a hypothetical posed by the court, that the AUMF provided authority to detain "[a] little old lady in Switzerland who writes checks to what she thinks is a charity that helps orphans in Afghanistan but [what] really is a front to finance al-Qaeda activities. . . ." *Id.* (internal citation omitted).

Court's initial tepid response to the Bush Administration's broad construction came in *Hamdi v. Rumsfeld*, where the Court held that the AUMF applied to "individuals who fought against the United States in Afghanistan as part of the Taliban, an organization known to have supported the al Qaeda terrorist network responsible for [the September 11, 2001] attacks."[78] The Court specifically acknowledged the AUMF's nexus requirement, recognizing that it covers only "'nations, organizations, or persons' associated with the September 11, 2001, terrorist attacks."[79] Finally, the Court recognized that the detention of AUMF-eligible individuals "for the duration of the particular conflict in which they were captured . . . is so fundamental and accepted an incident of war as to be an exercise of the 'necessary and appropriate force'" authorized in the AUMF.[80] The Court's decision, however, did not determine the full extent of the AUMF's scope.[81]

The Court addressed the AUMF twice more—in *Hamdan v. Rumsfeld*[82] and *Boumediene v. Bush*[83]—but neither case fully resolved the issue of the AUMF's scope. *Hamdan* held only that the AUMF did not provide a sufficiently clear statement to override Congress's previous authorization of military commissions through Article 21 of the Uniform Code of Military Justice.[84] The AUMF, therefore, did not extend to executive actions that were not specifically included, either in the statute's text or legislative history. Although some characterized the Court's ruling as rejecting the Bush Administration's supposed "blank check" construction of the AUMF,[85] the Court actually held the AUMF

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[78] *Hamdi*, 542 U.S. at 518.
[79] *Id.*
[80] *Id.*
[81] BENJAMIN WITTES et al., BROOKINGS INST., THE EMERGING LAW OF DETENTION 2.0: THE GUANTANAMO HABEAS CASES AS LAWMAKING 23 (2011), *available at* http://www.brookings.edu/~/media/Files/rc/papers/2011/05_guantanamo_wittes/05_guantanamo_wittes.pdf ("This holding left open the question of whether the AUMF . . . similarly provided for such non-criminal detention of persons captured in other circumstances. Less obviously, it also left open a set of difficult issues concerning what it meant to be a 'member' or 'part' of any of these organizations, at least some of which are better characterized as loose associational networks than as hierarchical organizations.").
[82] 548 U.S. 557 (2006).
[83] 553 U.S. 723 (2008).
[84] *Hamdan*, 548 U.S. at 559 ('[T]here is nothing in the AUMF's text or legislative history even hinting that Congress intended to expand or alter the authorization set forth in UCMJ Art. 21.").
[85] PBS Newshour, *High Court Blocks Guantanamo Tribunals*, June 29, 2006 (statement of Joseph Margulies) *available at* http://www.pbs.org/newshour/bb/law/jan-june06/guantanamo2_06-29.html ("[W]hile the court just addresses commission questions here,

inapplicable to the case, and therefore the AUMF's scope was not affected.[86] *Boumediene* similarly elided directly grappling with the AUMF, deciding on jurisdictional grounds only that "§ 7 of the Military Commissions Act of 2006 . . . operate[d] as an unconstitutional suspension of the writ" of habeas corpus.[87] Thus, the Supreme Court effectively delegated the task of judicially interpreting the AUMF to the lower courts.

Although the Obama Administration has attempted to rhetorically distance itself from the Bush Administration's approach—forcibly rejecting, for example, the Bush Administration's notion of a "global war on terror"[88]—it has "continued to defend a broad authority to detain suspected al Qaeda and affiliated terrorists based on the law of war."[89] The Obama Administration's conception of AUMF-covered individuals is

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the fact is this is now the second time that they have rejected the administration's position on the authorization for the use of military force, the proposition that the AUMF amounted to a blank and signed check now has been rejected twice."). Indeed, although the scope of the Court's decision in *Hamdan* was narrow, it has been hailed as "demonstrat[ing] the continued judicial resistance to the President's excessive claims of executive power and disregard for the rule of law." Jonathan Hafetz, *Vindicating the Rule of Law: The Legacy of* Hamdan v. Rumsfeld, 31 FLETCHER F. WORLD AFF. 25, 33 (2007).

[86] *Cf. Hamdan*, 548 U.S. at 681–82 (Thomas, J., dissenting) (arguing that the majority's suggestion "that the AUMF has no bearing on the scope of the President's power to utilize military commissions in the present conflict" was in "error").

[87] *Boumediene*, 553 U.S. at 732 ("We do not address whether the President has authority to detain these petitioners. . . .").

[88] *See, e.g.*, Toby Harnden, *Barack Obama Adviser Rejects 'Global War on Terror,'* THE TELEGRAPH, Aug. 7, 2009, http://www.telegraph.co.uk/news/worldnews/barackobama/5990566/Barack-Obama-adviser-rejects-global-war-on-terror.html ("John Brennan, a former career CIA officer who worked closely with the Bush administration, lambasted the policies of President George W Bush and made the case for a broader approach to fighting Islamic extremism.").

[89] Matthew C. Waxman, *Administrative Detention: Integrating Strategy and Institutional Design*, *in* LEGISLATING THE WAR ON TERROR: AN AGENDA FOR REFORM 43, 45 (Benjamin Wittes ed., 2009). *See also* Eli Lake, *The 9/14 Presidency*, REASON, Apr. 6, 2010, http://reason.com/archives/2010/04/06/the-914-presidency ("It's true that the president's speeches and some of his administration's policy rollouts have emphasized a break from the Bush era, [but] [w]hen it comes to the legal framework for confronting terrorism, President Obama is acting in no meaningful sense any different than President Bush after 2006. . . ."); Peter Bergen, *Warrior in Chief*, N.Y. TIMES, Apr. 28, 2012, http://www.nytimes.com/2012/04/29/opinion/sunday/president-obama-warrior-in-chief.html?r=1&ref=opinion (noting "the strange, persistent cognitive dissonance about this president and his relation to military force" that causes "many [to] continue to see him as the negotiator in chief rather than the warrior in chief that he actually is").

> persons who were part of, or substantially supported, Taliban or Al Qaeda forces or associated forces that are engaged in hostilities against the United States or its coalition partners, including any person who has committed a belligerent act, or has directly supported hostilities, in aid of such enemy forces.[90]

Thus, "the Obama administration adjusted the Bush Administration's standard only trivially,"[91] while leaving undefined the phrases "associated forces," "substantially supported," and "directly supported."[92] Indeed, the new administration avoided fully addressing the previous administration's contentions, arguing in court filings that the determination of the AUMF's extension to an individual should focus on whether that individual "was *functionally* 'part of' al Qaeda."[93]

The concept of "associated forces" warrants a brief analytical detour, as the phrase forms the outer limit of the AUMF's scope. Arguing that the AUMF covers Al Qaeda members is uncontroversial, but just how far beyond that undisputed claim the AUMF reaches is disputed. In other words, how the law conceives of Al Qaeda's "associated forces" ultimately determines who can be targeted and detained pursuant to the AUMF. The Obama Administration has placed increasing emphasis on the phrase, noting that "[t]he concept has become more relevant over time, as al Qaeda has, over the last 10 years, become more de-

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[90] Respondent's Memorandum Regarding The Government's Detention Authority Relative to Detainees Held at Guantánamo Bay, *In Re* Guantánamo Bay Detainee Litigation, Misc. No. 08-442, at 2 (D.D.C. Mar. 13, 2009), *available at* http://www.justice.gov/opa/documents/memo-re-det-auth.pdf.

[91] Jack Goldsmith, *Long-Term Terrorist Detention and a U.S. National Security Court*, *in* LEGISLATING THE WAR ON TERROR: AN AGENDA FOR REFORM 75, 84 (Benjamin Wittes ed., 2009).

[92] Indeed, commentators have noted that much of the current confusion in the applicable standard centers on the ambiguity of these phrases. *See* Benjamin Wittes & Robert Chesney, *NDAA FAQ: A Guide for the Perplexed*, LAWFARE, http://www.lawfareblog.com/2011/12/ndaa-faq-a-guide-for-the-perplexed/ ("The D.C. Circuit, in fact, has tentatively adopted a definition of the class detainable under the AUMF that is, if anything, broader than what the administration seeks. While the administration—and now Congress—would detain only on the basis of 'substantial support,' the D.C. Circuit has articulated a standard which would permit detention of those who 'purposefully and materially support' the enemy, even if not substantially.").

[93] Letter from Sharon Swingle, Justice Dep't Civil Div., to the Clerk of the United States Court of Appeals for the District of Columbia Circuit at 1, Bensayah v. Obama, 610 F.3d 718 (D.C. Cir. Sept. 22, 2009) (No. 08-5537) (emphasis added) (cited in WITTES et al., *supra* note 81, at 29).

centralized, and relies more on associates to carry out its terrorist aims."[94] According to the administration, an "associated force" "has two characteristics to it: (1) an organized, armed group that has entered the fight alongside al Qaeda, and (2) is a co-belligerent with al Qaeda in hostilities against the United States or its coalition partners."[95] This construction of the phrase, aside from its extreme pliability, also notably excludes any reference to an "associated force's" involvement in the September 11 attacks, further distancing the Obama Administration's interpretation from the text and purpose of the AUMF itself. Although the concept's outer limit is unclear, courts have noted that "'[a]ssociated forces' do not include terrorist organizations who merely share an abstract philosophy or even a common purpose with al Qaeda" and that "there must be an actual association in the current conflict with al Qaeda or the Taliban."[96]

In light of the lack of overarching framework legislation in the area of detention operations, the D.C. federal district and appellate courts have been the main actors addressing the AUMF's scope.[97] The D.C. Circuit Court of Appeals, as the designated appellate body for habeas cases in the conflict against Al Qaeda, "has developed a broad consensus that membership in an AUMF-covered group is a sufficient condition for detention."[98] However, this left open the crucial question of "[w]hat precisely counts as 'membership' in a clandestine, diffused network such as Al Qaeda?"[99] Courts have considered various factors, including participation in the Al Qaeda chain of command and participation in Al Qaeda training camps.[100] However, the judicial finding of membership in

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[94] Jeh Johnsen, General Counsel, U.S. Dep't of Defense, National Security Law, Lawyers and Lawyering in the Obama Administration (Feb. 22, 2012) [hereinafter Johnson, Lawyering in the Obama Administration], *available at* http://www.lawfareblog.com /2012/02/jeh-johnson-speech-at-yale-law-school/ (last visited Feb. 25, 2012).

[95] *Id.* ("In other words, the group must not only be aligned with al Qaeda. It must have also entered the fight against the United States or its coalition partners. Thus, an 'associated force' is not any terrorist group in the world that merely embraces the al Qaeda ideology. More is required before we draw the legal conclusion that the group fits within the statutory authorization for the use of military force passed by the Congress in 2001.").

[96] Hamlily v. Obama, 616 F. Supp. 2d 63, 75 n.17 (D.D.C. 2009).

[97] For a criticism of this development, see BENJAMIN WITTES, LAW AND THE LONG WAR: THE FUTURE OF JUSTICE IN THE AGE OF TERROR 103–30 (2008).

[98] WITTES et al., *supra* note 81, at 32.

[99] *Id*.

[100] *Id.* at 32–33. "'[M]ere sympathy for or association with an enemy organization does not render an individual a member' of that enemy organization." *Hamlily*, 616 F. Supp. 2d at 75 n.17 (quoting Gherebi v. Obama, 609 F. Supp. 2d 43, 68 (D.D.C. 2009)).

an organization within the scope of the AUMF remains a "gestalt impression conveyed by the totality of the circumstances, measured against unspecified—and potentially inconsistent—metrics of affiliation held by particular judges."[101]

In sum, the AUMF's current meaning is far from clear. Significant disagreements exist about, among other areas, the AUMF's geographic scope; its temporal vitality; its applicability to U.S. citizens and new, Al Qaeda-affiliated groups; and the extent of the government's detention authority. No political consensus exists, precluding the development of any implicit understandings about the AUMF's scope. The Supreme Court appears unlikely to act affirmatively to more proactively define the conflict, as it has seemed to act only to correct executive overreaching. The prosecution of U.S. military efforts against terrorism, however, is too important to leave in this state of uncertainty.

IV. Why the United States Needs a New AUMF

The AUMF must inevitably expire because it is expressly linked to the September 11, 2001, attacks against the United States. Moreover, because of the impending downfall of Al Qaeda as we know it, the statute's demise will come more quickly than most assume. Although the United States still faces myriad terrorist threats, the threat from Al Qaeda itself—the "core" group actually responsible for 9/11—is dissipating. So long as a substantial terrorist threat continues, however, the United States will require a framework within which to combat terrorist organizations and activities. Consequently, Congress should enact a new statute that supersedes the AUMF and addresses the major legal and constitutional issues relating to the use of force by the President that have arisen since the September 11 attacks and will persist in the foreseeable future.

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[101] WITTES et al., *supra* note 81, at 33. *See also* Khan v. Obama, 741 F. Supp. 2d 1, 5 (D.D.C. 2010) ("[T]here are no settled criteria for determining who is 'part of' the Taliban, al-Qaida, or an associated force. That determination must be made on a case-by-case basis by using a functional rather than formal approach and by focusing on the actions of the individual in relation to the organization. The Court must consider the totality of the evidence to assess the individual's relationship with the organization. But being 'part of' the Taliban, al-Qaida, or an associated force requires some level of knowledge or intent.") (internal citations and quotation marks omitted).

A. The AUMF's Inevitable Expiration

Although it is difficult to determine exactly when the AUMF will become obsolete, the mere fact that a precise date is unclear should not lead to the conclusion that the AUMF will be perpetually valid. Al Qaeda, the organization responsible for the September 11, 2001, attacks is considered by some to have been already rendered "operationally ineffective"[102] and "crumpled at its core."[103] Moreover, even if Al Qaeda continues to possess the ability to threaten the United States,[104] not all terrorist organizations currently possess a meaningful link to Al Qaeda, rendering the AUMF already insufficient in certain circumstances. Indeed, individuals from across the political spectrum have recognized that the AUMF's focus on those involved in "the terrorist attacks that occurred on September 11, 2001" is outdated and no longer addresses the breadth of threats facing the United States.[105] At a certain point, the

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[102] Greg Miller, *Al-Qaeda Targets Dwindle as Group Shrinks*, WASH. POST, Nov. 22, 2011, http://www.washingtonpost.com/world/national-security/al-qaeda-targets-dwindle-as-group-shrinks/2011/11/22/gIQAbXJNmN_story.html; *see also* JOHN YOO, WAR BY OTHER MEANS: AN INSIDER'S ACCOUNT OF THE WAR ON TERROR 148 (2006) ("[T]here is no reason to believe [the armed conflict against Al Qaeda] will go on for a generation. . . . Our current conflict is with al Qaeda, and we can declare hostilities over when it can no longer attack the United States in a meaningful way."); Paul D. Miller, *When Will the U.S. Drone War End?*, WASH. POST, Nov. 17, 2011, http://www.washingtonpost.com/opinions/when-will-the-us-drone-war-end/2011/11/15/gIQAZ677VN_story.html?hpid=z5 (arguing that the "war against al-Qaeda" will be over "when U.S. intelligence no longer judges al-Qaeda to be a clear and present danger to national security").

[103] Greg Miller, *Al-Qaeda Is Weaker Without bin Laden, but Its Franchise Persists*, WASH. POST, Apr. 27, 2012,http://www.washingtonpost.com/world/national-security/manhunt-details-us-mission-to-find-osama-bin-laden/2012/04/27/gIQAz5pLoT_story.html ("The emerging picture is of a network that is crumpled at its core, apparently incapable of an attack on the scale of Sept. 11, 2001, yet poised to survive its founder's demise . . . . 'The organization that brought us 9/11 is essentially gone,' said the official, among several who spoke on the condition of anonymity to discuss U.S. intelligence assessments of al-Qaeda with reporters a year after bin Laden was killed. 'But the movement . . . the ideology of the global jihad, bin Laden's philosophy – that survives in a variety of places outside Pakistan.'").

[104] For a recent argument on this point, see Seth G. Jones, *Think Again: Al Qaeda*, FOREIGN POL'Y, May/June 2012, *available at* http://www.foreignpolicy.com/articles/2012/04/23/think_again_al_qaeda?page=0,0 ("Predictions of al Qaeda's imminent demise are rooted more in wishful thinking and politicians' desire for applause lines than in rigorous analysis. Al Qaeda's broader network isn't even down—don't think it's about to be knocked out.").

[105] *See, e.g.*, Conor Friedersdorf, *The War on Terror Will Soon Be Illegal*, THE ATLANTIC, Nov. 28, 2011, http://www.theatlantic.com/politics/archive/2011/11/the-war-on-terror-will-soon-be-illegal/249153/ ("Obviously, there will be terrorists left in the world when

terrorist groups that threaten the United States targets will no longer have a plausible or sufficiently direct link to the September 11, 2001, attacks.[106]

This shift has likely already occurred. Former Attorney General Michael Mukasey, writing recently in support of efforts to reaffirm the original AUMF, noted that currently "there are organizations, including the Pakistani Taliban, that are arguably not within its reach."[107] It is similarly unclear if the AUMF extends to organizations like Al Qaeda in the Arabian Penninsula, whose formation as a group—and connection to Al Qaeda's "core"—postdates 9/11 and is indirect at best.[108] Former State Department Legal Adviser John Bellinger has argued that the Obama Administration's reliance on the AUMF for its targeted killing and detention operations is "legally risky" because "[s]hould our military or intelligence agencies wish to target or detain a terrorist who is not part of al-Qaeda, they would lack the legal authority to do so, unless the

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the folks who perpetrated 9/11 are dead or arrested, and it may even make sense to wage war on them. But doing so requires a new congressional authorization.").

[106] *See* Laurie R. Blank, *A Square Peg in a Round Hole: Stretching Law of War Detention Too Far*, 63 RUTGERS L. REV. 1169, 1182 (2011) ("Thus, the United States might defeat al-Qaeda in some meaningful way, ending their ability to launch any effective attacks against the United States or its allies. But, some other terrorist group will take up—or have already taken up—the same fight, and the United States will still be engaged in a conflict with terrorist groups.") (internal citation omitted).

[107] Letter from Michael B. Mukasey, to Congressman Howard P. "Buck" McKeon (May 20, 2011), *available at* http://www.lawfareblog.com/wp-content/uploades/2011/05/Mukasey-Letter.pdf).

[108] *See* Bruce Ackerman, *President Obama: Don't go there*, WASH. POST., Apr. 20, 2012, http://www.washingtonpost.com/opinions/expanding-bombings-in-yemen-takes-war-too-far/2012/04/20/gIQAq7hUWT_story.html (arguing that while "[t]he risk of attacks from Yemen may be real," "the 2001 resolution doesn't provide the president with authority to respond to these threats without seeking further congressional consent" and that the president should not "pretend[] that Congress has given him authority that Bush clearly failed to obtain at the height of the panic after Sept. 11"). *But see* Wittes & Chesney, *supra* note 92 ("[T]he AUMF on its face is certainly not a blanket authorization to use force against just any terrorist threat. But it does not follow that an attack directed at AQAP lies beyond the AUMF's scope."). An additional issue that surfaces with regard to AUMF-based targeting of AQAP operatives in Yemen is the extent to which their violent goals target opposing factions within Yemen or the United States itself. *See* Greg Miller, *U.S. Drone Targets in Yemen Raise Questions*, WASH. POST, June 4, 2010, http://www.washingtonpost.com/world/national-security/us-drone-targets-in-yemen-raise-questions/2012/06/02/gJQAP0jz9U_story.html ("In more than 20 U.S. airstrikes over a span of five months, three 'high-value' terrorism targets have been killed, U.S. officials said. A growing number of attacks have been aimed at lower-level figures who are suspected of having links to terrorism operatives but are seen mainly as leaders of factions focused on gaining territory in Yemen's internal struggle.").

administration expands (and the federal courts uphold) its legal justification."[109] Indeed, "[c]ircumstances alone . . . will put enormous pressure on—and ultimately render obsolete—the legal framework we currently employ to justify these operations."[110]

While the court of public opinion seems to have accepted the AUMF's inevitable expiration, courts of law appear poised to accept this argument as well. Justice O'Connor's plurality opinion in *Hamdi* admitted that the AUMF granted "the authority to detain for the duration of the relevant conflict."[111] She also suggested, however, that that authority would terminate at some point, based on "the practical circumstances of [this] conflict," which may be "entirely unlike those of the conflicts that informed the development of the law of war."[112] Justice Kennedy's opinion in *Boumediene* also hinted that the future contours of the war on terror might force the Court to revisit the extent of the conflict.[113] Lower federal courts have already started to ask some of the questions about the duration of the AUMF's authority, which the Supreme Court has left unaddressed to date.[114]

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[109] John B. Bellinger III, *A Counterterrorism Law in Need of Updating*, WASH. POST, Nov. 26, 2010, http://www.washingtonpost.com/wp-dyn/content/article/2010/11/25/AR2010112503116.html; *see also* Karen DeYoung & Greg Jaffe, *U.S. 'Secret War' Expands Globally As Special Operations Forces Take Larger Role*, WASH. POST, June 4, 2010, http://www.washingtonpost.com/wp-dyn/content/article/2010/06/03/AR2010060304965.html (quoting Bellinger as arguing that "[m]any of those currently being targeted . . . 'particularly in places outside Afghanistan,' had nothing to do with the 2001 attacks").

[110] Kenneth Anderson, *Targeted Killing in U.S. Counterterrorism Strategy and Law*, *in* LEGISLATING THE WAR ON TERROR: AN AGENDA FOR REFORM 346, 389 (Benjamin Wittes ed., 2009) [hereinafter Anderson, *Targeted Killing*] ("[T]errorism will not always be about something plausibly tied to September 11 or al Qaeda at all."); *see also* Kenneth Anderson, *Targeted Killing and Drone Warfare: How We Came to Debate Whether There Is a 'Legal Geography of War,' in* FUTURE CHALLENGES IN NATIONAL SECURITY AND LAW 8 (Peter Berkowitz ed., 2011) [hereinafter Anderson, *Legal Geography of War*], *available at* http://media.hoover.org/sites/default/files/documents/FutureChallenges_Anderson.pdf (noting "that the gradual passage of time and drift of terrorist groups meant that invocation of the [Non-International Armed Conflict], Al Qaeda, and the AUMF was moving toward a ritual, purely formalistic invocation").

[111] Hamdi v. Rumsfeld, 542 U.S. 507, 521 (2004) (plurality opinion).

[112] *Id.*

[113] Boumediene v. Bush, 553 U.S. 723, 797–98 (2008) ("Because our Nation's past military conflicts have been of limited duration, it has been possible to leave the outer boundaries of war powers undefined. If, as some fear, terrorism continues to pose dangerous threats to us for years to come, the Court might not have this luxury.");

[114] *See, e.g.*, Al-Aulaqi v. Obama, 727 F. Supp. 2d 1, 9 (D.D.C. 2010) ("[H]ow does the evolving AQAP [Al Qaeda in the Arabian Peninsula] relate to the core al Qaeda for purposes of assessing the legality of targeting AQAP (or its principals) under the

The Obama Administration has notably disagreed with these assessments, arguing that the AUMF "is still a viable authorization today."[115] The administration's position, however, appears contradictory, as it has simultaneously described the limited reach of the AUMF as "encompass[ing] only those groups or people with a link to the terrorist attacks on 9/11, or associated forces"[116] and celebrated the functional neutralization of Al Qaeda as a continuing threat to U.S. national security.[117] The administration's position, however, remains in the minority. Notwithstanding the administration's continuing fealty to the 2001 statute, as pressures build to address these issues, the "temporal vitality"[118] of the AUMF will continue to be challenged. The successful targeting of those responsible for the attacks of September 11, 2001, will ensure that the AUMF's vitality will not be indefinite.

Moreover, even if one rejects as overly optimistic the position that Al Qaeda is currently or will soon be incapable of threatening the United States, the AUMF is already insufficient to reach many terrorist organizations. Assuming a robust Al Qaeda for the indefinite future does not change the disconnected status of certain terrorist groups; as much as it might wish to the contrary, Al Qaeda does not control all Islamist terrorism.[119]

B. The Consequences of Failing to Reauthorize

The AUMF's inevitable expiration, brought about by the increasingly tenuous link between current U.S. military and covert

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September 18, 2001 Authorization for the Use of Military Force?"); *see also* Awad v. Obama, 608 F.3d 1, 11 (D.C. Cir. 2010) (recognizing that "the United States's authority to detain an enemy combatant is . . . dependent . . . upon the continuation of hostilities"); Padilla v. Bush, 233 F. Supp. 2d 564, 590 (S.D.N.Y. 2002) ("At some point in the future, when operations against al Qaeda fighters end, or the operational capacity of al Qaeda is effectively destroyed, there may be occasion to debate the legality of continuing to hold prisoners based on their connection to al Qaeda, assuming such prisoners continue to be held at that time.").

[115] Johnson, Lawyering in the Obama Administration, *supra* note 94.

[116] *Id.*

[117] Miller, *supra* note 102 (quoting an unnamed Obama administration official as stating that "[w]e have rendered the organization that brought us 9/11 operationally ineffective.").

[118] WITTES et al., *supra* note 81, at 42.

[119] *See* Paul R. Pillar, *The Diffusion of Terrorism*, 21 MEDITERRANEAN Q. 1, 3 (2010) ("Al Qaeda is, despite its salience and name recognition, only a piece of the larger organizational picture of Islamist terrorism.").

operations and those who perpetrated the September 11 attacks, leaves few good options for the Obama Administration. Unless Congress soon reauthorizes military force in the struggle against international terrorists, the administration will face difficult policy decisions. Congress, however, shows no signs of recognizing the AUMF's limited lifespan or a willingness to meaningfully re-write the statute. In light of this reticence, one choice would be for the Obama Administration to acknowledge the AUMF's limited scope and, on that basis, forego detention operations and targeted killings against non-Al Qaeda-related terrorists. For both strategic and political reasons, this is extremely unlikely, especially with a president in office who has already shown a willingness to defy legal criticism and aggressively target terrorists around the globe.[120] Another option would be for the Executive Branch to acknowledge the absence of legal authority, but continue targeted killings nonetheless. For obvious reasons, this option is problematic and unlikely to occur.

Therefore, the more likely result is that the Executive Branch, grappling with the absence of explicit legal authority for a critical policy, would need to make increasingly strained legal arguments to support its actions.[121] Thus, the Obama Administration will soon be forced to rationalize ongoing operations under existing legal authorities, which, I argue below, will have significant harmful consequences for the United States. Indeed, the administration faces a Catch-22—its efforts to destroy Al Qaeda as a functioning organization will lead directly to the vitiation of the AUMF. The administration is "starting with a result and finding the legal and policy justifications for it," which often leads to poor policy formulation.[122] Potential legal rationales would perforce rest on exceedingly strained legal arguments based on the AUMF itself, the President's Commander in Chief powers, or the international law of self-

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[120] John B. Bellinger III, *Will Drone Strikes Become Obama's Guantanamo?*, WASH. POST, Oct. 2, 2011, http://www.washingtonpost.com/opinions/will-drone-strikes-become-obamas-guantanamo/2011/09/30/gIQA0ReIGL_story.html ("[T]he U.S. legal position may not satisfy the rest of the world. No other government has said publicly that it agrees with the U.S. policy or legal rationale for drones.").

[121] Of course, this assumes that continuing the United States' worldwide armed conflict against terrorism is a sound policy option. However, in the short- and medium-term, it appears highly unlikely that either the Obama Administration, or a Republican president taking office in January 2013, will deviate from the current strategy.

[122] Blank, *supra* note 106, at 1191 (describing the Obama Administration's policy towards "indefinite detention of terrorist suspects" as "tak[ing] a problematic decision and 'prettify[ing]' it").

defense.[123] Besides the inherent damage to U.S. credibility attendant to unconvincing legal rationales, each alternative option would prove legally fragile, destabilizing to the international political order, or both.

1. Effect on Domestic Law and Policy

Congress's failure to reauthorize military force would lead to bad domestic law and even worse national security policy. First, a legal rationale based on the AUMF itself will increasingly be difficult to sustain. Fewer and fewer terrorists will have any plausible connection to the September 11 attacks or Al Qaeda, and arguments for finding those connections are already logically attenuated. The definition of those individuals who may lawfully be targeted and detained could be expanded incrementally from the current definition, defining more and more groups as Al Qaeda's "co-belligerents" and "associated forces."[124] But this approach, apart from its obvious logical weakness, would likely be rejected by the courts at some point.[125] The policy of the United States should not be to continue to rely on the September 18, 2001, AUMF.

Second, basing U.S. counterterrorism efforts on the President's constitutional authority as Commander in Chief is legally unstable, and therefore unsound national security policy, because a combination of legal difficulties and political considerations make it unlikely that such a rationale could be sustained. This type of strategy would likely run afoul

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[123] Furthermore, if Congress does not reauthorize the AUMF, "it is possible that the courts could have the last word in determining the scope of the armed conflict, even though they are the branch of government with the least degree of competence to make those decisions." *Ten Years After the 2001 AUMF: Current Status of Legal Authorities, Detention, and Prosecution in the War on Terror Before the H. Comm. on Armed Servs.*, 112th Cong. 8 (2011) (statement of Steven Engel, former Deputy Ass't Att'y Gen. in the Office of Legal Counsel of the U.S. Dep't of Justice). Besides the issue of institutional competence, acquiescing to the courts also implicates concerns about democratic control over the current armed conflict.

[124] *See, e.g.*, Anderson, *Targeted Killing*, *supra* note 110, at 389 ("As new terrorist enemies emerge, so long as they are 'jihadist' in character, we might continue referring to them as 'affiliated' with al Qaeda and therefore co-belligerent. But the label will eventually become a mere legalism in order to bring them under the umbrella of an AUMF passed after September 11.").

[125] *See, e.g.*, Bellinger, *supra* note 109; *Ten Years After the 2001 AUMF: Current Status of Legal Authorities, Detention, and Prosecution in the War on Terror Before the H. Comm. on Armed Servs.*, 112th Cong. (2011) (statement of Steven Engel, former Deputy Ass't Att'y Gen. in the Office of Legal Counsel of the U.S. Dep't of Justice).

of the courts and risk destabilizing judicial intervention,[126] because the Supreme Court has shown a willingness to step in and assert a more proactive role to strike down excessive claims of presidential authority.[127] Politically, using an overly robust theory of the Commander in Chief's powers to justify counterterrorism efforts would, ultimately, be difficult to sustain. President Obama, who ran for office in large part on the promise of repudiating the excesses of the Bush Administration, and indeed any president, would likely face political pressure to reject the claims of executive authority made "politically toxic" by the writings of John Yoo.[128] Because of the likely judicial resistance and political difficulties, claiming increased executive authority to prosecute the armed conflict against Al Qaeda would prove a specious and ultimately futile legal strategy. Simply put, forcing the Supreme Court to intervene and overrule the Executive's national security policy is anathema to good public policy. In such a world, U.S. national security policy would lack stability—confounding cooperation with allies and hindering negotiations with adversaries.

There are, of course, many situations where the president's position as Commander in Chief provides entirely uncontroversial authority for military actions against terrorists. In 1998, President Clinton ordered cruise missile strikes against Al Qaeda-related targets in Afghanistan and

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[126] *See* WITTES, *supra* note 36, at 62 ("One can still make a theoretical argument for an executive-only approach to problems like global terrorism. In practice, however, the argument is an unreal dream. When the president bypasses Congress—and Congress so willingly lets him do so—the result will not, in fact, be unrestrained executive latitude. It will be litigation, and another institution will step in to fill the void: the courts. When the executive branch untethers itself from statutory law, the courts will examine its actions with a more powerful microscope. If they lack clear law to apply, they will tend to create it with whatever surrogates might be available. The day has long passed when the executive branch can count on the courts to declare that the absence of a Congress saying 'no' is the equivalent of the legislature's saying 'yes.'").

[127] *See* Hamdan v. Rumsfeld, 548 U.S. 557, 636 (2006) (Breyer, J., concurring) ("The Court's conclusion ultimately rests upon a single ground: Congress has not issued the Executive a 'blank check.'"); Hamdi v. Rumsfeld, 542 U.S. 507, 535–36 (2004) (plurality opinion) ("[W]e necessarily reject the Government's assertion that separation of powers principles mandate a heavily circumscribed role for the courts in such circumstances. Indeed, the position that the courts must forgo any examination of the individual case . . . cannot be mandated by any reasonable view of separation of powers, as this approach serves only to condense power into a single branch of government.").

[128] Aaron Nielson, *An Indirect Argument for Limiting Presidential Power*, 30 HARV. J.L. & PUB. POL'Y 727, (2007) (reviewing of JOHN YOO, THE POWERS OF WAR AND PEACE: THE CONSTITUTION AND FOREIGN AFFAIRS AFTER 9/11 (2005)) ("*The Powers of War and Peace* [is] so politically toxic that [Judge] Alito's failure to reject its premises out of hand was, for many, 'radical.'").

Sudan in response to the embassy bombings in Kenya and Tanzania. In 1986, President Reagan ordered air strikes against Libyan targets after U.S. intelligence linked the bombing of a Berlin discotheque to Libyan operatives.[129] Executive authority to launch these operations without congressional approval was not seriously questioned, and no congressional approval was sought.[130] To be sure, many of the targeted killing operations carried out today fall squarely within the precedent of past practice supplied by these and other valid exercises of presidential authority. Notwithstanding disagreement about the scope of Congress's and the president's "war powers," few would disagree with the proposition that the president needs no authorization to act in self-defense on behalf of the country. However, it is equally clear that not all terrorists pose such a threat to the United States, and thus the

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[129] Of course, the historical record provides many more examples of unilateral presidentially authorized military action, many of which have occurred since the passage of the War Powers Resolution in 1973, whose purpose was "to ensure that Congress and the President share in making decisions that may get the United States involved in hostilities." RICHARD GRIMMETT, CONG. RESEARCH SERV., RL33532, WAR POWERS RESOLUTION: PRESIDENTIAL COMPLIANCE (summary) (2012), *available at* http://www.fas.org/sgp/crs/natsec/RL33532.pdf. Since 1973, "[p]residents have submitted 134 reports to Congress as a result of the War Powers Resolution," *id.*, each time representing the use of U.S. armed forces "without obtaining congressional authorization for such action." *Id.* Most recently, the Obama Administration deployed significant air forces in Libya, but argued that the War Powers Resolution did *not* apply because the military deployment fell short of "hostilities." *See Libya and War Powers: Hearing Before the S. Comm. on Foreign Relations*, 112th Cong. 14 (2011) (statement of Harold Koh, Legal Adviser, U.S. Dep't of State) ("[T]he term [hostilities] should not necessarily be read to include situations where the nature of the mission is limited[,] . . . the exposure of U.S. forces is limited[, and] the risk of escalation is therefore limited."). *But see* Michael J. Glennon, *Forum: The Cost of "Empty Words": A Comment on the Justice Department's Libya Opinion*, HARV. NAT'L SECURITY J. 6 (Apr. 14, 2011), http://harvardnsj.org/wp-content/uploads/2011/04/Forum_Glennon.pdf (questioning the Obama Administration's reliance on Executive precedent and arguing that that "[t]he President cannot call a war something other than a war and thereby dispense with the Constitution's requirement of congressional approval"). Additionally, the Obama Administration based its *domestic law* justification in part on the *international* authorization of the United Nations Security Council. This argument, although employed by the Executive Branch on several occasions, has also been widely criticized. *See, e.g.*, *id.* at 8 ("[Because the UN Charter is non-self-executing,] *Medellin* thus undercuts arguments that the [UN] Charter combined with a Security Council resolution provided a domestic source of war power permitting the President to use force in Libya.").

[130] *See* Robert Chesney, *Military-Intelligence Convergence and the Law of the Title 10/Title 50 Debate*, 5 J. NAT'L SECURITY L. & POL'Y 539, 558 (2012) (noting that by 1998, "the Clinton administration's lawyers apparently had concluded that 'under the law of armed conflict killing a person who posed an imminent threat to the United States would be an act of self-defense, not assassination.'" (quoting FINAL REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES 132 (2004))).

Commander in Chief cannot justify all counterterrorism operations as "self-defense."

A third option would be to conduct all counterterrorism operations as covert operations under the aegis of Title 50.[131] Although the CIA typically carries out such "Title 50 operations," the separate roles of the military and intelligence community have become blurred in recent years.[132] The president must make a "finding" to authorize such operations,[133] which are conducted in secret to provide deniability for the U.S. Government.[134]

Relying entirely on covert counterterrorism operations, however, would suffer from several critical deficiencies. First, even invoking the cloak of "Title 50," it is "far from obvious" that covert operations are legal without supporting authority.[135] In other words, Title 50 operations, mostly carried out by the CIA, likely also require "sufficient domestic law foundation in terms of either an AUMF or a legitimate claim of inherent constitutional authority for the use of force under Article II."[136] Second, covert operations are by definition kept out of public view, making it difficult to subject them to typical democratic review. In light of "the democratic deficit that already plagues the nation in the legal war

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[131] "Title 50 authority has . . . become a shorthand . . . that refers to the domestic law authorization for engaging in quintessential intelligence activities such as intelligence collection and covert action." *Id.* at 616. The shorthand, however, masks a complicated area of law and policy, most of which defies easy summary because of both its complexity and its secrecy. *See generally* Andru E. Wall, *Demystifying the Title 10-Title 50 Debate: Distinguishing Military Operations, Intelligence Activities & Covert Action*, 3 J. NAT'L SECURITY L. & POL'Y 86 (2011).

[132] *See* Wall, *supra* note 131, at 91 ("[T]he use of 'Title 50' to refer solely to activities conducted by the CIA is, at best, inaccurate as the Secretary of Defense also possesses significant authorities under Title 50.").

[133] Chesney, *supra* note 130, at 601 ("[T]he current domestic legal architecture for national security activities imposes a presidential authorization obligation on activity constituting covert action . . . .").

[134] Anderson, *Legal Geography of War*, *supra* note 110, at 15 (describing how "targeted killing using drones [has gone] from more-or-less covert to merely 'plausibly deniable' to 'implausibly deniable'").

[135] Chesney, *supra* note 130, at 616 ("It is far from obvious that the only relevant domestic law question is whether Congress has given the CIA standing authority to engage in covert action.").

[136] *Id.* ("It is easy to answer in the affirmative with respect to this particular example; the AUMF provides a relatively strong foundation for resolving such Title 10 concerns. The important point, however, is that the drone program probably requires justification under both headings, and thus that it can be a bit misleading to ask *solely* about authorization under Title 10 or Title 50.").

on terror,"[137] further distancing counterterrorism operations from democratic oversight would exacerbate this problem.[138] Indeed, congressional oversight of covert operations—which, presumably, operates with full information—is already considered insufficient by many.[139] By operating entirely on a covert basis, "the Executive can initiate more conflict than the public might otherwise [be] willing to support."[140]

In a world without a valid AUMF, the United States could base its continued worldwide counterterrorism operations on various alternative domestic legal authorities. All of these alternative bases, however, carry with them significant costs—detrimental to U.S. security and democracy. The foreign and national security policy of the United States should rest on "a comprehensive legal regime to support its actions, one that [has] the blessings of Congress and to which a court would defer as the collective judgment of the American political system about a novel set of

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[137] Derek Jinks & Neal Kumar Katyal, *Disregarding Foreign Relations Law*, 116 YALE L.J. 1230, 1276–77 (2007) (noting that the "presidential netherworld" where "the President has been acting without the explicit support of the legislature" "is bad for the reputation of the United States, as well as for our deliberative democracy"). *See also* Samuel Issacharoff, *Political Safeguards in Democracies at War*, 29 OXFORD J. LEGAL. STUD. 189, 198 (2009) ("The 'war on terror' therefore presents a particularly worrisome situation: it can be fought clandestinely, it does not require broad-scale troop mobilizations, and it can be financed essentially off the books by deficit spending. These features also enable asymmetric wars to be fought without political accountability and broad-based consent, moving far beyond the enhanced executive power necessary to and expected during the conduct of traditional wars.").

[138] Jon D. Michaels, *Beyond Accountability: The Constitutional, Democratic, and Strategic Problems with Privatizing War*, 82 WASH. U. L.Q. 1001, 1078 (2004) ("[T]he legitimacy of military policymaking depends not just on broad congressional involvement, but also on democratic input and popular consent.").

[139] *See* Jennifer D. Kibbe, *Conducting Shadow Wars*, 5 J. NAT'L SECURITY L. & POL'Y 373, 383 (2012) (emphasizing that "the critical question is whether intelligence, and specifically covert action, issues are receiving appropriate congressional oversight").

[140] Michaels, *supra* note 138, at 1077. The democratic deficit vis-à-vis covert operations is not a new theory; it has surfaced as a significant problem in U.S. foreign policy, most prominently during the Iran-Contra affair. *See* HOUSE SELECT COMM. TO INVESTIGATE COVERT ARMS TRANSACTIONS WITH IRAN AND SENATE SELECT. COMM. ON SECRET MILITARY ASSISTANCE TO IRAN AND THE NICARAGUAN OPPOSITION, REPORT OF THE CONGRESSIONAL COMMS. INVESTIGATING THE IRAN-CONTRA AFFAIR, S. REP. NO. 216, H.R. REP. NO. 433, 100th Cong., 1st Sess. 11 (1987), *available at* http://ia600301.us.archive.org/19/items/reportofcongress87unit/reportofcongress87unit.pdf ("The Administration's departure from democratic processes created the conditions for policy failure, and led to contradictions which undermined the credibility of the United States.").

problems."[141] Only then can the President's efforts be sustained and legitimate.

2. Effect on the International Law of Self-Defense

A failure to reauthorize military force would lead to significant negative consequences on the international level as well. Denying the Executive Branch the authority to carry out military operations in the armed conflict against Al Qaeda would force the President to find authorization elsewhere, most likely in the international law of self-defense—the *jus ad bellum*.[142] Finding sufficient legal authority for the United States's ongoing counterterrorism operations in the international law of self-defense, however, is problematic for several reasons. As a preliminary matter, relying on this rationale usurps Congress's role in regulating the contours of U.S. foreign and national security policy. If the Executive Branch can assert "self-defense against a continuing threat" to target and detain terrorists worldwide, it will almost always be able to find such a threat.[143] Indeed, the Obama Administration's broad understanding of the concept of "imminence" illustrates the danger of allowing the executive to rely on a self-defense authorization alone.[144]

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[141] WITTES, *supra* note 36, at 65.

[142] This position is most prominently promoted by Professor Kenneth Anderson, who argues that the United States should base its policy of targeted killing on the international law of self-defense, rather than the conduct of ongoing hostilities, because accepting an international humanitarian law approach "will subject the United States to requirements that it has not traditionally accepted as a matter of international law but that it will find difficult to dismiss when the IHL standard of armed conflict has not been met." Anderson, *Targeted Killing*, *supra* note 110, at 370. *See also* Anderson, *Legal Geography of War*, *supra* note 110, at 14 (arguing that future presidents should rely on "the category of naked self-defense" to respond to "terrorist threats unrelated to the AUMF that have not yet ripened into [Non-International Armed Conflict] but that a future president believes must be met with force").

[143] Anderson, *Targeted Killing*, *supra* note 110, at 370. Anderson also refers to the "accumulation of events" and "active defense view of anticipatory self-defense" theories as providing similar justification. *Id.*

[144] Eric H. Holder, Jr., Att'y Gen. of the United States, Address at Northwestern University School of Law (Mar. 5, 2012), *available at* http://www.justice.gov/iso/opa/ag/speeches/2012/ag-speech-1203051.html (recognizing that the "Constitution empowers the President to protect the nation from any imminent threat of violent attack" but noting that "whether an individual presents an 'imminent threat' incorporates considerations of the relevant window of opportunity to act, the possible harm that missing the window would cause to civilians, and the likelihood of heading off future disastrous attacks against the United States"). *See also* Chesney, *supra* note 130, at 554

This approach also would inevitably lead to dangerous "slippery slopes." Once the President authorizes a targeted killing of an individual who does not pose an imminent threat in the strict law enforcement sense of "imminence,"[145] there are few potential targets that would be off-limits to the Executive Branch. Overly malleable concepts are not the proper bases for the consistent use of military force in a democracy. Although the Obama Administration has disclaimed this manner of broad authority because the AUMF "does not authorize military force against anyone the Executive labels a 'terrorist,'"[146] relying solely on the international law of self defense would likely lead to precisely such a result.

The slippery slope problem, however, is not just limited to the United States's military actions and the issue of domestic control. The creation of international norms is an iterative process, one to which the United States makes significant contributions. Because of this outsized influence, the United States should not claim international legal rights that it is not prepared to see proliferate around the globe. Scholars have observed that the Obama Administration's "expansive and open-ended interpretation of the right to self-defence threatens to destroy the prohibition on the use of armed force . . . ."[147] Indeed, "[i]f other states were to claim the broad-based authority that the United States does, to kill people anywhere, anytime, the result would be chaos."[148]

("The debate over how imminent a threat must be in order to warrant lethal force remains a central question—perhaps *the* central question—today.").

[145] *See* Tennesee v. Garner, 471 U.S. 1, 3 (1985) ("We conclude that [lethal] force may not be used unless it is necessary to prevent the escape and the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others.").

[146] Johnson, Lawyering in the Obama Administration, *supra* note 94.

[147] Philip Alston, Statement of U.N. Special Rapporteur on U.S. Targeted Killings Without Due Process (Aug. 3, 2010), *available at* http://www.aclu.org/national-security/statement-un-special-rapporteur-us-targeted-killings-without-due-process.

[148] *Id.* Indeed, the Obama Administration's new formulation of the concept of "imminence" stands in stark contrast to the widely accepted customary international law standard of self-defense—the "Caroline doctrine"—which allows self-defense if "the necessity of that self-defense is instant, overwhelming, and leaving no choice of means and no moment for deliberation." Jordan J. Paust, *Self-Defense Targetings of Non-State Actors and Permissibility of U.S. Use of Drones in Pakistan*, 19 J. TRANSNAT'L L. & POL'Y 237, 242 (2010) (citing Letter from Daniel Webster, U.S. Sec'y of State, to Lord Ashburton (Aug. 6, 1842), *in* 4 TREATIES AND OTHER INTERNATIONAL ACTS OF THE UNITED STATES OF AMERICA 454, 455 (Hunter Miller ed., 1934)). *See also* Samuel Estreicher, *Privileging Asymmetric Warfare (Part II)?: The "Proportionality" Principle Under International Humanitarian Law*, 12 CHI. J. INT'L L. 143, 147 (2011) (describing "Secretary of State Daniel Webster's 1841–42 correspondence with his British counterparts concerning and 1837 Canadian attack in US waters on the Caroline" as

Encouraging the proliferation of an expansive law of international self-defense would not only be harmful to U.S. national security and global stability, but it would also directly contravene the Obama Administration's national security policy, sapping U.S. credibility. The Administration's National Security Strategy emphasizes U.S. "moral leadership," basing its approach to U.S. security in large part on "pursu[ing] a rules-based international system that can advance our own interests by serving mutual interests."[149] Defense Department General Counsel Jeh Johnson has argued that "[a]gainst an unconventional enemy that observes no borders and does not play by the rules, we must guard against aggressive interpretations of our authorities that will discredit our efforts, provoke controversy and invite challenge."[150] Cognizant of the risk of establishing unwise international legal norms, Johnson argued that the United States "must not make [legal authority] up to suit the moment."[151] The Obama Administration's global counterterrorism strategy is to "adher[e] to a stricter interpretation of the rule of law as an essential part of the wider strategy" of "turning the page on the past [and rooting] counterterrorism efforts within a more durable, legal foundation."[152]

"[t]he classic formulation of the customary rule" of self-defense); Peter Margulies, *When to Push the Envelope: Legal Ethics, The Rule of Law, and National Security Strategy*, 30 FORDHAM INT'L L.J. 642, 669 (2007) (noting that "Article 51 of the U.N. Charter . . . arguably codifies the customary international law principle articulated in Webster's letter").

[149] THE WHITE HOUSE, NATIONAL SECURITY STRATEGY 12 (2010), *available at* http://www.whitehouse.gov/sites/default/files/rss_viewer/national_security_ strategy.pdf. *See also id.* at 22 ("The United States must reserve the right to act unilaterally if necessary to defend our nation and our interests, yet we will also seek to adhere to standards that govern the use of force. Doing so strengthens those who act in line with international standards, while isolating and weakening those who do not.").

[150] Johnson, Lawyering in the Obama Administration, *supra* note 94. *See also* Colonel Kelly D. Wheaton, *Strategic Lawyering: Realizing the Potential of Military Lawyers at the Strategic Level*, ARMY LAW., Sept. 2006, at 11 ("The United States must act consistently from a values basis and cannot appear to act hypocritically or parochially. Anything that adversely affects perceptions about the U.S. goals in the war on terrorism will weaken U.S. global legitimacy, and, therefore, adversely affect U.S. ability to successfully prosecute the war on terrorism.").

[151] *Id.* ("[I]n the conflict against an *unconventional* enemy such as al Qaeda, we must consistently apply *conventional* legal principles. We must apply, and we have applied, the law of armed conflict, including applicable provisions of the Geneva Conventions and customary international law, core principles of distinction and proportionality, historic precedent, and traditional principles of statutory construction.").

[152] MARC LYNCH, RHETORIC AND REALITY: COUNTERING TERRORISM IN THE AGE OF OBAMA 23 (2010), *available at* http://www.cnas.org/files/documents/publications/CNAS_Rhetoric%20and%20Reality_Lynch.pdf. Reliance on the stability-producing

Widely accepted legal arguments also facilitate cooperation from U.S. allies, especially from the United States' European allies, who have been wary of expansive U.S. legal interpretations.[153] Moreover, U.S. strategy vis-à-vis China focuses on binding that nation to international norms as it gains power in East Asia.[154] The United States is an international "standard-bearer" that "sets norms that are mimicked by others,"[155] and the Obama Administration acknowledges that its drone strikes act in a quasi-precedential fashion.[156] Risking the obsolescence of the AUMF would force the United States into an "aggressive interpretation" of international legal authority,[157] not just discrediting its

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effects of international norms are not a novel feature of U.S. national security policy. *See* U.S. DEP'T OF DEFENSE, THE NATIONAL DEFENSE STRATEGY OF THE UNITED STATES OF AMERICA 7 (2005) (noting that one of the four strategic objectives of the National Defense Strategy is to create an environment "conducive to a favorable international system").

[153] *See* Jennifer C. Daskal, *The Geography of the Battlefield: A Framework for Detention and Targeting Outside the "Hot" Conflict Zone*, 161 U. PENN. L. REV. (manuscript at 27) (forthcoming 2012), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstratc_id=2049532 (arguing that the United States should "seek international consensus" in "drawing a distinction between zones of active hostilities and elsewhere" to accommodate the "[k]ey European partners [who] have long viewed the conflict with al Qaeda as limited to the hot battlefield of Afghanistan and northwest Pakistan (and formerly Iraq)").

[154] David Nakamura, *Obama Heads to Bali After Touting Partnership to Australian Lawmakers, Troops*, WASH. POST, Nov. 17, 2011, http://www.washingtonpost.com/world/obama-rallies-australian-troops-around-new-us-military-partnership/2011/11/17/gIQASp2rTN_story.html?hpid=z1 ("At the summit, the United States and other countries will press China to agree to abide by 'international norms' in regards to the South China Sea . . ., administration officials said.").

[155] Daskal, *supra* note 153, at 28 ("Even if the United States thinks that it will exercise its asserted authorities responsibly, there are good reasons to be concerned about countries such as China, Russia, or Iran relying on United States' precedent to argue that it can detain without charge, or even worse, kill any suspected non-state enemy wherever they might be found."). *See also* Jo Becker & Scott Shane, *Secret 'Kill List' Proves a Test of Obama's Principles and Will*, N.Y. TIMES, May 29, 2012, http://www.nytimes.com/2012/05/29/world/obamas-leadership-in-war-on-al-qaeda.html?pagewanted=1&_r=1&sq=Obama%20and%20drones&st=nyt&scp=1 ("With China and Russia watching, the United States has set an international precedent for sending drones over borders to kill enemies.").

[156] *See* John O. Brennan, Ass't to the President for Homeland Security and Counterterrorism, The Ethics and Efficacy of the President's Counterterrorism Strategy, Remarks at the Woodrow Wilson International Center for Scholars (Apr. 30, 2012), *available at* http://www.wilsoncenter.org/event/the-efficacy-and-ethics-us-counterterrorism-strategy (last visited June 4, 2012) (arguing that because "[t]he United States is the first nation to regularly conduct strikes using remotely piloted aircraft in an armed conflict . . . we are establishing precedents that other nations may follow").

[157] LYNCH, *supra* note 152, at 24 ("The dramatic escalation of drone strikes against alleged leaders in Afghanistan, Pakistan, Yemen and elsewhere has been seen as a serious

own rationale, but facilitating that rationale's destabilizing adoption by nations around the world.[158]

United States efforts to entrench stabilizing global norms and oppose destabilizing international legal interpretations—a core tenet of U.S. foreign and national security policy[159]—would undoubtedly be hampered by continued reliance on self defense under the *jus ad bellum* to authorize military operations against international terrorists. Given the presumption that the United States's armed conflict with these terrorists will continue in its current form for at least the near term, ongoing authorization at the congressional level is a far better choice than continued reliance on the *jus ad bellum*. Congress should reauthorize the use of force in a manner tailored to the global conflict the United States is fighting today. Otherwise, the United States will be forced to continue to rely on a statute anchored only to the continued presence of those responsible for 9/11, a group that was small in 2001 and, due to the continued successful targeting of Al Qaeda members, is rapidly approaching zero.

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potential gap in the administration's commitment to the rule of law. The administration has strongly defended the legality of these drone strikes, but the legal foundations as to how drone strikes are carried out remain hotly contested."). Indeed, Lynch has noted that drone strikes place the administration's emphasis on the international rule of law in jeopardy, arguing that "[i]f the administration believes its original arguments about the importance of the rule of law for creating a durable and legitimate strategy, then it needs to act accordingly." *Id.*

[158] Norms of international behavior exercise a profound, yet complex and little understood, influence on state behavior. *See, e.g.*, Harold Honju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599, 2651 (1997) ("As governmental and nongovernmental transnational actors repeatedly interact within the transnational legal process, they generate and interpret international norms and then seek to internalize those norms domestically. To the extent that those norms are successfully internalized, they become future determinants of why nations obey."). The point is not that U.S. rationales for targeted killing operations will directly cause other nations to replicate such actions, but that other nations will find it easier to justify violating an international norm if the United States is itself violating it. *See, e.g.*, Shirley V. Scott, *Identifying the Source and Nature of a State's Political Obligation towards International Law*, 1 J. INT'L L. & INT'L REL. 49, 49 (2005) (discussing "the impact . . . of the United States-led military action [against Iraq] on the specific content of the law of the use of force"); Geoffrey Corn & Dennis Gyllensporre, *International Legality, the Use of Military Force, and Burdens of Persuasion: Self-Defense, the Initiation of Hostilities, and the Impact of the Choice Between Two Evils on the Perception of International Legitimacy*, 30 PACE L. REV. 484, 526 (2010) (noting "the consequence[s] of being perceived as operating outside the accepted norms of international law in relation to the use of force").

[159] *See supra* notes 149–152 and accompanying text.

V. Reauthorizing the War on Terrorism: Towards a Balanced AUMF

In reaffirming the AUMF and reauthorizing military force against terrorist groups, Congress should look to the current contours of the threat of terrorism for guidance on how best to rewrite the statute. September 11 should not continue to be the *raison d'être* of global military counterterrorism operations. This section will first describe Congress's most recent effort to reaffirm the AUMF in the 2012 National Defense Authorization Act (NDAA), which ultimately left the problem of the AUMF's obsolescence unaddressed. It will then propose a standard for each of the five elements of the AUMF's scope previously analyzed in Part III, as well as several additional elements that are necessary to address issues that have arisen since the original AUMF's passage.

One counterargument to this proposal—and, indeed any proposal requiring greater congressional involvement—is that Congress is simply not up to the task. In this era of unparalleled congressional dysfunction, it seems unrealistic to presume Congress could agree on any given piece of legislation, let alone legislate a novel framework in a controversial policy area.[160] Such feasibility arguments, however, while an important reality check, should not stymie proposals for policy improvement. Indeed, political feasibility arguments often break down when the wisdom of a policy is demonstrated; to wit, cogent analysis of a previously infeasible position can illustrate its benefits, thereby rendering it more feasible. In the end, feasibility is both an independent and a dependent variable; it affects other arguments, but can also be affected itself.

A. The 2012 National Defense Authorization Act: Authorizing Permanent War?

In the 2012 legislative cycle, Congress chose to address the AUMF as part of the annual reauthorization of the Department of Defense's activities. Neither chamber, however, resolved the problem of the AUMF's rapidly approaching obsolescence.

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[160] Jinks & Katyal, *supra* note 137, at 1278 ("In the real world, it is far easier for Congress to do nothing than to do something.").

1. The House of Representatives—H.R. 1540

The House considered the AUMF through Section 1034 of its version of the NDAA. First, § 1034(1) reaffirmed that "the United States is engaged in an armed conflict with al-Qaeda, the Taliban, and associated forces."[161] Second, § 1034(2) reaffirmed the President's "authority to use all necessary and appropriate force during the current armed conflict with al-Qaeda, the Taliban, and associated forces."[162] Third, § 1034(3) defined the target as including

> nations, organizations, and persons who are part of, or are substantially supporting, al-Qaeda, the Taliban, or associated forces that are engaged in hostilities against the United States or its coalition partners; or have engaged in hostilities or have directly supported hostilities or have directly supported hostilities in aid of a nation, organization, or person described [above].[163]

Finally, § 1034(4) specifically notes that "the President's authority . . . includes the authority to detain belligerents . . . until the termination of hostilities."[164] At first, it seems as though the House version mirrors current law as embodied by the Obama Administration's proposed definition of those who can be detained pursuant to the AUMF. Indeed, "Section 1034's definition of the enemy thus reflects the legal status quo."[165] Nevertheless, although it codifies the Obama Administration's current position, it includes no reference to the September 11 attacks, making it, in principle at least, a broader authorization of force without a logical or temporal conclusion.[166]

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[161] H.R. 1540, 112th Cong. § 1034(1) (2011).
[162] *Id.* § 1034(2).
[163] *Id.* § 1034(3).
[164] *Id.* § 1034(4).
[165] *Ten Years After the 2001 AUMF: Current Status of Legal Authorities, Detention, and Prosecution in the War on Terror Before the H. Comm. on Armed Servs.*, 112th Cong. 7 (2011) (statement of Steven Engel, former Deputy Ass't Att'y Gen. in the Office of Legal Counsel of the U.S. Dep't of Justice) ("Section 1034 does nothing more, but also no less, than confirm that Congress agrees with how the President has understood the existing armed conflict and his detention authority under the AUMF.").
[166] Letter from American Civil Liberties Union, to House Armed Services Committee (May 9, 2011) (arguing that § 1034 "could commit the United States to a worldwide war without clear enemies, without any geographical boundaries, . . . and without any boundary relating to time or specific objective to be achieved").

2. The Senate—S. 1867

The Senate version of the NDAA focused on the narrow issue of detention, but departed from the House bill in its definition of the target. Section 1031 of the Senate NDAA defines the enemy as *both* those already subject to the AUMF[167] and as

> [a] person who was a part of or substantially supported al-Qaeda, the Taliban, or associated forces that are engaged in hostilities against the United States or its coalition partners, including any person who has committed a belligerent act or has directly supported such hostilities in aid of such enemy forces.[168]

This would have introduced a definitional complexity into the AUMF, because the difference between those two groups seems to imply that the latter group would be an additional valid target under the AUMF. This interpretation, however, is at odds with the rest of § 1031, which foreclosed any general change to the legal status quo by stating that "[n]othing in this section is intended to limit or expand the authority of the President or the scope of the Authorization for Use of Military Force."[169] Indeed, the expanded definition cannot be squared with the Senate voting "99 to 1 to say the bill does not affect 'existing law' about people arrested inside the United States."[170] The Senate bill also based the origin of its detention authority on the AUMF, subjecting it to the AUMF's quickly diminishing temporal vitality.[171]

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[167] S. 1867, 112th Cong. § 1031(b)(1) (2011) ("A person who planned authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored those responsible for those attacks.").
[168] *Id.* § 1031(b)(2).
[169] *Id.* § 1031(d).
[170] Charlie Savage, *Senate Declines to Clarify Rights of American Qaeda Suspects Arrested in U.S.*, N.Y. TIMES, Dec. 1, 2011, http://www.nytimes.com/2011/12/02/us/senate-declines-to-resolve-issue-of-american-qaeda-suspects-arrested-in-us.html?_r=1.
[171] S. 1867, 112th Cong. § 1031(a) ("Congress affirms that the authority of the President to use all necessary and appropriate force pursuant to the Authorization for Use of Military Force (Public Law 107-40) includes the authority for the Armed Forces of the United States to detain covered person . . . pending disposition under the law of war.").

3. A Missed Opportunity—The 2012 National Defense Authorization Act

Although both the House and Senate failed separately to address the major outstanding issues presented by the AUMF and its uncertain temporal vitality, the conference process of merging the House and Senate versions presented an additional opportunity to remedy these issues. The final bill, however, also failed to place U.S. global counterterrorism efforts on sound legal footing. Indeed, much of the political capital spent during the process focused on the narrow issue of mandating military detention for terrorist suspects.[172]

Section 1021 addressed the AUMF, "affirm[ing] that the authority of the President to use all necessary and appropriate force pursuant to the Authorization for Use of Military Force . . . includes the authority for the Armed Forces of the United States to detain covered persons . . . pending disposition under the law of war."[173] In allowing detention under the law of war of "covered persons," Congress affirmed the authority of the president to detain those who perpetrated the September 11 attacks,[174] while also expanding the group of those legally detainable to include anyone "who was a part of or substantially supported al-Qaeda, the Taliban, or associated forces that are engaged in hostilities against the United States or its coalition partners."[175] This latter group includes "any person who has committed a belligerent act or has directly supported such hostilities in aid of such enemy forces."[176]

These ostensible changes to the president's legal authority were counteracted, however, by the provision's subsequent sections, which repudiated any change to the status quo. Section (d) noted that "[n]othing in this section is intended to limit or expand the authority of the President

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[172] Wittes & Chesney, *supra* note 92 ("The NDAA is a spending authorization bill for the military fiscal year 2012. At more than 1,000 pages, it does a great many things. Almost all of the controversy about it, however, deals with a single portion of the bill: 'Subtitle D-Counterterrorism.' This subtitle contains a number of provisions related to military detention of terrorism suspects and the interaction between military detention and the operation of the criminal justice system.").

[173] National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, § 1021(a), 125 Stat. 1298 (2011).

[174] *Id.* § 1021(b)(1) ("A covered person under this section is any person . . . who planned authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored those responsible for those attacks.").

[175] *Id.* § 1021(b)(2).

[176] *Id.*

or the scope of the Authorization for Use of Military Force,"[177] while section (e) stated a similar disclaimer "relating to the detention of United States citizens, lawful resident aliens of the United States, or any other persons who are captured or arrested in the United States."[178] The absence of any change to the status quo was underscored by various legislators' statements.[179]

Though seeming to lead the United States into a new era of the military conflict against terrorism, the statute in actual effect changed very little, if anything. President Obama had initially opposed the NDAA's statutory language relevant to the AUMF because, "in purporting to affirm the conflict, [section 1034 of the House bill] would effectively recharacterize its scope and would risk creating confusion regarding applicable standards."[180] The president, however, ultimately signed the bill, recognizing that its final version "breaks no new ground and is unnecessary" with regard to the AUMF.[181] Indeed, commentators have observed that "a law that writes the administration's successful

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[177] *Id.* § 1021(d).

[178] *Id.* § 1021(e).

[179] *See, e.g.*, 157 CONG. REC. S8656 (daily ed. Dec. 15, 2011) (statement by Sen. Richard Durbin) ("[W]e have agreed, on a bipartisan basis, to include language in the bill offered by Senator Feinstein that makes it clear this bill does not change existing detention authority in any way. What it means is, the Supreme Court will make the decision who can and cannot be detained indefinitely without trial, not the Senate."); 157 CONG. REC. S8636 (daily ed. Dec. 15, 2011) (statement by Sen. John McCain) ("[T]his provision does not and is not intended to change the existing state of the law with regard to detention of U.S. citizens. This section simply restates the authority to detain what has already been upheld by the Federal courts. We are not expanding or limiting the authority to detain as established by the 2001 authorization for the use of military force."); Savage, *supra* note 170 (quoting Senator Carl Levin of Michigan as saying "We make clear that whatever the law is, it is unaffected by this language in our bill"). *But see* 157 CONG. REC. S8654 (daily ed. Dec. 15, 2011) (statement by Sen. Patrick Leahy) ("Section 1021 expands the 2001 Authorization of the Use of Military Force to include the authority to detain and hold indefinitely any person, even a U.S. citizen, if the military suspects that such a person has supported any force associated with al-Qaeda.").

[180] Office of Mgmt. & Budget, Exec. Office of the President, Statement of Administration Policy: H.R. 1540—National Defense Authorization Act for FY 2012, at 2, *available at* http://www.whitehouse.gov/sites/default/files/omb/legislative/sap/112/saphr1540r_20110524.pdf (noting that "[a]t a minimum, this is an issue that merits more extensive consideration before possible inclusion").

[181] Office of Mgmt. & Budget, Exec. Office of the President, Statement by the President on H.R. 1540, Dec. 31, 2011, http://www.whitehouse.gov/the-press-office/2011/12/31/statement-president-hr-1540 (last visited Feb. 6, 2012) ("My Administration strongly supported the inclusion of these limitations in order to make clear beyond doubt that the legislation does nothing more than confirm authorities that the Federal courts have recognized as lawful under the 2001 AUMF.").

litigating position into statute cannot reasonably be said to expand the government's detention authority."[182] Others, however, have disagreed, interpreting the 2012 NDAA as an unambiguous expansion of authority.[183]

The 2012 NDAA explicitly disclaims any change to the law prior to its passage, but its precise effect remains to be determined. Ultimately, however, the statute remains anchored to the 2001 AUMF, keeping a link

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[182] Wittes & Chesney, *supra* note 92 ("In fact, to the extent that the new statutory language will preempt the arguably broader D.C. Circuit definition [of the class detainable under the AUMF], it may actually narrow it—if only very slightly."). For the opposing view, see Professor Stephen Voss's response to Wittes and Chesney that "[t]he NDAA says more than the AUMF says" and "[t]here is certainly no unequivocal endorsement within the court system of that additional authority." Benjamin Wittes, *Stephen Voss Responds to Our FAQ*, LAWFARE, Dec. 22, 2011, http://www.lawfareblog.com/2011/12/stephen-voss-responds-to-our-faq/#more-4474 ("In a perfectly clear way, [the] NDAA expands the government's detention authority."); *see also* Benjamin Wittes, *Raha Wala Writes His Own FAQ*, LAWFARE, Dec. 20, 2011, http://www.lawfareblog.com/2011/12/raha-wala-writes-his-own-faq/ ("[I]f the question is whether the NDAA goes further than any statute-based detention authority upheld by our nation's highest court, I think the answer is undoubtedly yes. Similarly, if the question is whether the NDAA strengthens any future administration's hand in detaining members of 'associated forces' or supporters of al Qaeda and affiliated groups, I think one has to answer in the affirmative.").

[183] In *Hedges v. Obama*—the only case to date that has considered the 2012 NDAA's language—Judge Katherine Forrest of the Southern District of New York ruled in a preliminary injunction order that "Section 1021 [of the NDAA] is certainly far from a verbatim reprise of the AUMF [and] assume[d] . . . that Congress acted intentionally when crafting the differences as between the two statutes." No. 12 Civ. 331(KBF), 2012 WL 1721124, at *26 (S.D.N.Y. May 16, 2012). "[T]he AUMF is tied directly and only to those involved in the events of 9/11 [while] Section 1021 . . . has a non-specific definition of 'covered persons' that reaches beyond those involved in the 9/11 attacks by its very terms." *Id.* Judge Forrest's ruling, however, has been widely criticized, and its viability is unclear. *See* Robert Chesney, *Issues with* Hedges v. Obama, *and a Call for Suggestions for Statutory Language Defining Associated Forces*, LAWFARE, May 17, 2012, http://www.lawfareblog.com/2012/05/issues-with-hedges-v-obama-and-a-call-for-suggestions-for-statutory-language-defining-associated-forces/ ("I am puzzled, very much, by the judge's refusal to construe the NDAA as no more and no less broad than the AUMF. At page 3, she asserts that she is forced to construed (sic) them to be different out of deference to the principle that a separate statute must be presumed to have 'independent meaning.' Yet Section 1021(d) makes painfully clear that Congress indeed intended the two to be coextensive."); Benjamin Wittes, *A Few Thoughts on* Hedges, LAWFARE, May 17, 2012, http://www.lawfareblog.com/2012/05/a-few-thoughts-on-hedges/ ("The key point missed by Judge Forrest is that while the language of the NDAA differs substantially from the language of the AUMF, there is *virtually no difference at all* between the detention authority authorized by the NDAA and the detention authority authorized by the AUMF *as interpreted by the D.C. Circuit*.").

to the perpetrators of 9/11 as the basis for the U.S. military's worldwide counterterrorism operations.

B. Reauthorizing Military Force Against Terrorist Organizations—A Framework

Even after this most recent legislative fight over the AUMF, the statute's ambiguous scope and temporal vitality remain unaddressed. To the extent that any aspect of the president's AUMF-related authority was altered, how specifically the language changed the law is far from clear. Therefore, a new authorization for using military force against terrorist organizations is needed now more than ever.

This section lays out a framework for reauthorizing the AUMF, identifying the key areas to address and recommending solutions for each. Rather than proposing specific legislative language, this section identifies the most important elements that a new AUMF should address and offers potential solutions. Regardless of the specific language adopted, a stand-alone measure would be preferable to inclusion in broader, omnibus legislation. Such a process would allow true debate around a durable foundation for counterterrorism operations, rather than becoming just one element of a broader compromise. While Congress does not often debate a single measure unattached to other legislation, the impending withdrawal of American troops from Afghanistan—symbolizing, if not marking, the end of a relatively geographically concentrated era of counterterrorism and the beginning of an era of diffuse, global counterterrorism—could likely provide the event-based impetus for reconsideration of the AUMF.

1. Object

The object – *who* is the enemy—is perhaps the most difficult issue to address.[184] Finding an adequate solution must still address the threat from

[184] *Ten Years After the 2001 AUMF: Current Status of Legal Authorities, Detention, and Prosecution in the War on Terror Before the H. Comm. on Armed Servs.*, 112th Cong. 9 (2011) (statement of Professor Robert Chesney) ("Fleshing out the associated forces concept is no simple task, unfortunately. At a minimum Congress should consider establishing a statutory reporting mechanism to ensure Congressional awareness of the executive branch's ongoing applications of the concept."). Congresswoman Barbara Lee, the only Member of Congress to oppose the original AUMF, recently introduced a bill to

Al Qaeda, while at the same time acknowledging both that Al Qaeda has evolved into a diffuse, networked organization and that other terrorist organizations now pose equal or greater threats than Al Qaeda.[185] Merely stating that a person or group constitutes part of an "associated force" of Al Qaeda should not be sufficient to authorize military force.[186] Congress should adopt a hybrid approach in this circumstance, establishing a specific list of organizations that would fall under a new AUMF. Subsequently, if the President felt another organization should be added to the list, he could propose this to Congress through an expedited procedure. This would allow Congress to maintain a workable definition of the enemy and provide the president with flexibility, while also preventing *ipso facto* targeting determinations by the Executive Branch. Because not all terrorist organizations are the same, and some pose little or no threat to the United States, the fact of classification as a terrorist group alone should not suffice to trigger the use of military force.[187] Put differently, classification as a "Foreign Terrorist Organization" would be necessary but not sufficient for a renewed AUMF to apply.[188] The Executive Branch does not currently argue that the AUMF covers all of the organizations on the Foreign Terrorist Organization list. Through hearings and testimony, Congress should establish which terrorist organizations merit the authorization of continuing military force.[189]

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repeal the AUMF because it "has been used to justify . . . an ever-growing and indefinite pursuit of an ill-defined enemy abroad." David Swanson, *Congresswoman Lee Introduces Bill to Repeal AUMF*, FIREDOGLAKE (Sept. 6, 2011, 7:23 PM), http://my.firedoglake.com/davidswanson/2011/09/06/congresswoman-lee-introduces-bill-to-repeal-aumf/.

[185] *See, e.g.*, Leah Farrall, *How al Qaeda Works: What the Organization's Subsidiaries Say About Its Strength*, FOREIGN AFF., Mar./Apr. 2011, at 128, 134 ("[S]ince fleeing Afghanistan to Pakistan's tribal areas in late 2001, al Qaeda has founded a regional branch in the Arabian Peninsula and acquired franchises in Iraq and the Maghreb.").

[186] *See supra* notes 86–91 and accompanying text.

[187] *See* Michael J. Ellis, Comment, *Disaggregating Legal Strategies in the War on Terror*, 121 YALE L.J. 237, 245 (2011) ("If, as counterinsurgency theory suggests, defeating Al Qaeda requires separating local grievances from global ideology, our legal strategies should treat Al Qaeda and other organizations with global goals differently from local insurgents with limited goals.").

[188] The extreme outer limit of defining the enemy would thus be the State Department's "Foreign Terrorist Organizations" list. Dep't of State, http://www.state.gov/s/ct/rls/other/des/123085.htm. Authorizing military force against groups such as the Irish Republican Army would seem to not be necessary, and would in fact send potentially counterproductive diplomatic signals.

[189] Disentangling the use of military force and "official" terrorist groups would support efforts to distinguish the varied threats against the United States. Even if it were possible, not all terrorist groups are best combated through military force. Indeed, the purpose of classifying "official" terrorist groups is principally correlated to targeting sanctions and terrorism-related criminal laws, such as the "Material Support" statute. *See* 18 U.S.C. §

Recent legislation addressing the Lord's Resistance Army—which operates across South Sudan, the Central African Republic, the Democratic Republic of the Congo, and northern Uganda[190]—could serve as a model. Although not an explicit authorization for the use of military force, Congress specifically legislated to "eliminate the threat posed by the Lord's Resistance Army."[191] Congress could undoubtedly direct similar attention to other terrorist organizations.[192]

"Persons" should be addressed in a similar fashion—on a selective and continuing basis by Congress. It will be a rare case in which an individual who has no affiliation with a larger terrorist group poses a significant threat to U.S. national security, but current policy

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2339B(a)(1) (Suppl. V 2006) ("Whoever knowingly provides material support or resources to a foreign terrorist organization . . . shall be fined under this title or imprisoned not more than 15 years, or both . . . ."). *But see* Ellis, *supra* note 187, at 247 (arguing that "the material support statute [should] criminalize support only for organizations that could be targeted with military force").

[190] For a thorough recent analysis of the LRA, see INTERNATIONAL CRISIS GROUP, THE LORD'S RESISTANCE ARMY: END GAME?, AFRICA REP. NO. 182–17, Nov. 2011, *available at* http://www.crisisgroup.org/en/regions/africa/horn-of-africa/uganda/182-the-lords-resistance-army-end-game.aspx.

[191] Lord's Resistance Army Disarmament and Northern Uganda Recovery Act of 2009, Pub. L. No. 111-172, 124 Stat. 1209 (2010). In the act, Congress declared that U.S. policy is "to work with regional governments toward a comprehensive and lasting resolution to the conflict in northern Uganda [by] providing political, economic, military, and intelligence support for viable multilateral efforts to protect civilians from the Lord's Resistance Army, to apprehend or remove Joseph Kony and his top commanders from the battlefield in the continued absence of a negotiated solution, and to disarm and demobilize the remaining Lord's Resistance Army fighters." *Id.* § 3. *See also* ALEXIS ARIEFF & LAUREN PLOCH, CONG. RESEARCH SERV., R42094, THE LORD'S RESISTANCE ARMY: THE U.S. RESPONSE (2012), *available at* http://www.fas.org/sgp/crs/row/R42094.pdf.

[192] Although an example of Congressional attention to a single armed group, President Obama's subsequent deployment of approximately 100 military advisors to the region in 2011 to "provide assistance to regional forces that are working toward the removal of Joseph Kony from the battlefield also demonstrates the staying power of unilateral Executive initiative vis-à-vis Congress in military operations." White House Press Release, Letter from the President, to the Speaker of the House of Representatives and the President Pro Tempore of the Senate Regarding the Lord's Resistance Army (Oct. 14, 2011), *available at* http://www.whitehouse.gov/the-press-office/2011/10/14/letter-president-speaker-house-representatives-and-president-pro-tempore, also demonstrates the staying power of unilateral Executive initiative vis-à-vis Congress in military operations. Indeed, although the President authorized the deployment "[i]n furtherance of the Congress's stated policy," he also did so "pursuant to [his] constitutional authority to conduct U.S. foreign relations and as Commander in Chief and Chief Executive." *Id.* I thank Major Andrew Gillman for suggesting this point.

nevertheless shows that individual designations are feasible.[193] A policy of selective individual designation would also allow policy flexibility in the event that the President wishes to separate a dangerous individual from a more benign organization.[194]

"Nations" should not be included in the new AUMF. If another attack against the United States or its allies calls for an operation of a scale similar to that in Afghanistan in October of 2001, Congress should authorize that military action specifically. An armed conflict with a country poses far too many risks for the Executive Branch to do so alone.

Within the specific context of the target of the AUMF, Congress should address the process due to U.S. citizens under the Constitution. It is not clear that U.S. citizens fighting in an armed conflict against the United States need to be provided heightened process—judicial or executive or other—before targeting decisions are made, but Congress should nonetheless publicly describe the process that will be followed when a U.S. citizen is involved.[195] In a democracy such decisions are

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[193] Press Release, U.S. Dep't of State, Office of the Coordinator for Counterterrorism, Individuals and Entities Designated by the State Department Under E.O. 13224 (Jan. 26, 2012), *available at* http://www.state.gov/j/ct/rls/other/des/143210.htm (last visited June 24, 2012).

[194] *US Mulling to Designate Haqqani Network as FTO*, THE NATION, Sept. 28, 2011, http://nation.com.pk/pakistan-news-newspaper-daily-english-online/Politics/28-Sep-2011/US-reviewing-to-designate-Haqqani-network-as-FTO?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+pakistan-news-newspaper-daily-english-online%2FPolitics+%28The+Nation+%3A+Politics+News%29 ("The State Department has carried out a number of Executive Order 13224 designations that target, essentially the kingpins of the Haqqani Network financiers, leadership, as well as some of its most dangerous operatives.").

[195] Some have argued for the use of special procedures when the U.S. federal government targets U.S. citizens. *See, e.g.*, Lindsay Kwoka, Comment, *Trial by Sniper: The Legality of Targeted Killing in the War on Terror*, 14 U. PA. J. CONST. L. 301, 317 (2011) ("While such procedural protections as affording actual notice and providing the opportunity to rebut the assertions against him are not feasible in the context of targeted killing, a neutral decisionmaker should review the executive's decision to use targeted killing before a citizen can be killed,"). Other scholars have argued for similar procedures regardless of the targets' citizenship. *See* Richard Murphy & Afsheen John Radsan, *Due Process and Targeted Killing of Terrorists*, 31 CARDOZO L. REV. 405, 447–48 (2009) ("A *Matthews*-style balancing suggests that to protect this right to life, the United States, too, has a duty to conduct intra-executive review of the use of deadly force through targeted killing."). A review procedure, however, need not be onerous or prohibitively intrusive or extensive. *See* Scott Shane, *U.S. Approves Targeted Killing of American Cleric*, N.Y. TIMES, Apr. 6, 2010, http://www.nytimes.com/2010/04/07/world/middleast/07/world/middleeast/07yemen.html (describing that Anwar al-Awlaki's inclusion on the CIA and military "lists of terrorists linked to Al Qaeda and its affiliates who are approved for

best made in the public eye.[196] The recent successful targeting of Anwar al-Awlaki, a U.S. citizen affiliated with Al Qaeda in the Arabian Peninsula and operating in Yemen, demonstrated the American public's considerable skepticism toward military operations against U.S. citizens.[197] Even if an increased level of process is ultimately decided upon, such a step would not overly burden the Executive Branch, as very few U.S. citizens are part of terrorist groups in armed conflict with the United States.[198]

Some would challenge the basis of public determinations about organizational targets, but there is no reason that such a step would impart any tactical advantage to a terrorist organization. Indeed, although legal definitions and targeting determinations are not as clear today, it seems logical that any terrorist organization targeted by the United States knows it is being targeted. Furthermore, providing a regular review process whereby the President proposes new groups for Congress to include, as well as a defined sunset clause on each authorization, would encourage those terrorist groups that have goals not actually at odds with U.S. national interests to make their intentions known.[199]

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capture or killing" "had to be approved by the National Security Council" because Awlaki is a U.S. citizen).

[196] *See* Benjamin McKelvey, Note, *Due Process Rights and the Targeted Killing of Suspected Terrorists: The Unconstitutional Scope of Executive Killing Power*, 44 VAND. J. TRANSNAT'L L. 1353, 1358–59 (2011) ("[A]s the case of Anwar al-Aulaqi demonstrates, the legal standards for targeted killing are unknown, a chilling thought given the extraordinary power involved."); *see also supra* notes 137–140 and accompanying text.

[197] *See, e.g.*, Scott Shane, *U.S. Approval of Killing of Cleric Causes Unease*, N.Y. TIMES, May 13, 2010, http://www.nytimes.com/2010/05/14/world/14awlaki.html ("The Obama administration's decision to authorize the killing by the Central Intelligence Agency of a terrorism suspect who is an American citizen has set off a debate over the legal and political limits of drone missile strikes, a mainstay of the campaign against terrorism. The notion that the government can, in effect, execute one of its own citizens far from a combat zone, with no judicial process and based on secret intelligence, makes some legal authorities deeply uneasy.")

[198] One possible solution would be to require specific presidential certification of the citizen's status and the exhaustion of all non-lethal means before a U.S. citizen could be targeted. The 2002 Authorization for Use of Military Force against Iraq included such a certification requirement, albeit in a different context. Authorization for Use of Military Force Against Iraq Resolution of 2002, § 3(b), Pub. L. No. 107-243, 116 Stat. 1498.

[199] *See* Press Release, U.S. Dep't of State, Office of the Coordinator for Counterterrorism, Foreign Terrorist Organizations (Jan. 27, 2012) [hereinafter U.S. Dep't of State], *available at* http://www.state.gov/j/ct/rls/other/des/123085.htm (last visited June 24, 2012) ("FTO designations play a critical role in our fight against terrorism and are an effective means of . . . pressuring groups to get out of the terrorism business."). Indeed,

2. Method

Any approach to reauthorizing the AUMF should identify which specific "incidents of warfare" it contemplates.[200] Uncertainty regarding the extent of authority diminishes the potential for military success; those charged with fighting the global armed conflict against terrorist groups should know precisely what is authorized. Moreover, policy clarity is a virtue in a democracy, allowing the citizenry to more effectively monitor the actions of its military. The reauthorized AUMF should specifically include authorization for both detention and the lethal use of force, as well as clear standards for both. These standards, discussing, for example, how targeting decisions are made, should be public and describe the differences in their application to U.S. citizens and non-citizens.[201] The government need not disclose the specific weaponry employed or tactics used, but it should indicate when lethal force will be used against a threat that is not strictly imminent. To monitor potential abuses, internal executive branch oversight should be intensified, empowering either an independent board or inspector general to investigate abuses of targeting authority. In the detention context, meaningful review should be available for those detained; the word of the Executive Branch alone should not be sufficient to render an individual detainable.

Arguments will likely be made that disclosing targeting methods will empower terrorists. It is unlikely, however, that those targeted today are unaware of that fact. Clarity would also be a virtue, allowing those "on the fence" to distance themselves from targetable terrorist groups. Moreover, such a tactical disadvantage, assuming it is borne out in reality, is a cost that should be accepted when the State targets its own citizens.

"[u]ntil recently the [Immigration and Nationality Act] provided that FTOs must be redesignated every 2 years or the designation would lapse." *Id.*

[200] *See* Hamdi v. Rumsfeld, 542 U.S. 507, 518 (2004) (plurality opinion).

[201] *See Ten Years After the 2001 AUMF: Current Status of Legal Authorities, Detention, and Prosecution in the War on Terror Before the H. Comm. on Armed Servs.*, 112th Cong. 3 (2011) (statement of Michael Mukasey, former Attorney General) ("It should be amended to make clear to all involved, from troops to lawyers to judges—and to our enemies—that detention of suspected terrorists is authorized, and to set forth standards for detaining and/or killing terrorists, even those who are affiliated with groups other than those directly responsible for the 9/11 attacks.").

3. Time

Because of the expansion in the definition of the enemy, it is prudent for Congress to exercise more demanding oversight over a reauthorized global armed conflict against terrorists.[202] One way in which Congress could exercise such oversight is by superseding the original AUMF with a time-limited statute. With defined sunset clauses for the entire statute, or, alternatively, for the authorization of force against each specific group, the reauthorized AUMF would demand regular, but not continuous, attention from Congress.[203] Furthermore, if any aspect of the reauthorization proves unworkable or unwise, or if new developments challenge the existing authorization, Congress would be more likely to amend the statute, rather than encourage the Executive Branch to extrapolate vague legal standards from the statute's text. Moreover, time limits increase in importance when the United States is engaged in a conflict that some have considered has no logical end,[204] and employing lethal force is arguably the most important act the State undertakes. Therefore, "requir[ing] Congress and the President to re-ante every so often" is a minimally intrusive oversight mechanism given the important interests involved.[205]

4. Place

A reauthorized AUMF should clarify that the geographic reach of authorized military force against terrorists is global, but not domestic—it would reach every country but the United States itself.[206] A restriction to certain countries, however, is unnecessary and fraught with diplomatic landmines. Of course, the United States would not likely conduct kinetic

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[202] *See* Laurie R. Blank, *Defining the Battlefield in Contemporary Conflict and Counterterrorism: Understanding the Parameters of the Zone of Combat*, 39 GA. J. INT'L & COMP. L. 1, 22 (2010) ("[T]he diffuse geographic nature of most conflicts with terrorist groups generally makes traditional temporal concepts unlikely to apply effectively to such conflicts.").

[203] Similar previous "sunsets" were generally a length of two years. *See supra* note 199.

[204] *See* Stephen I. Vladeck, *Ludecke's Lengthening Shadow: The Disturbing Prospect of War Without End*, 2 J. NAT'L SECURITY L. & POL'Y 53, 53 (2006) ("The 'war' on terrorism may never end. At a minimum, it shows no sign of ending any time soon.").

[205] *See id.* at 95.

[206] *See* Blank, *supra* note 106, at 1174 ("If the United States is engaged in an armed conflict with terrorist groups—namely al-Qaeda—the question of where that conflict is taking place becomes critically important in assessing whether a particular person is being detained in connection with that armed conflict.").

counterterrorism operations "in friendly states permitting effective cooperation with authorities."[207] Explicitly excluding U.S. allies, such as Canada and the United Kingdom, from the authorization of military force, would beg the question of why other countries were not similarly included. This, in turn, would force the United States to publicly draw lines, needlessly alienating certain allies. Such a policy could also have the perverse effect of creating "safe harbors" in certain areas for terrorists.[208] Moreover, because authorizing any attack against a foreign government should be considered independently by Congress, the reauthorized statute would focus only on individuals and groups, who are highly mobile and not tied to any one country. Indeed, the basic geographic reach of a terrorist organization should be a factor considered by Congress in authorizing military force against it.

Additionally, a reauthorized AUMF should explicitly state that it provides authority for the use of force *abroad* only. This will provide a clear statement to preclude any future disagreements over domestic wiretapping, indefinite detention of those detained on U.S. soil, and the legality of using military force within the territory of the United States.[209] Moreover, such a restriction—or, more accurately, the absence of a provision affirmatively authorizing domestic military force—would merely accept the status quo created by the Posse Comitatus Act.[210] Under this framework, the military is not prevented from deploying domestically to repel an invasion or confront a major military attack, it is only prohibited from exercising law enforcement powers. Maintaining the exclusion of the military from acting in U.S. territory does not endanger U.S. national security, it merely acknowledges the dangers

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[207] Anderson, *Legal Geography of War*, *supra* note 110, at 11 (arguing that "no covert counterterrorism uses of force [are necessary] in London or Paris or Mumbai," but that "Yemen, Pakistan, Somalia, and so on" are "a different story").

[208] *See* Blank, *supra* note 202, at 26 ("Geographic limits designed to curtail the use of governmental military force thus effectively grant terrorists a safe haven and extend the conflict by enabling them to regroup and continue their attacks.").

[209] *See supra* Part III.A.4. For an analysis of the importance of "clear statements" with regard to the AUMF's geographic scope, see Steve Vladeck, *The Problematic NDAA: On Clear Statements and Non-Battlefield Detention*, LAWFARE, Dec. 13, 2011, http://www.lawfareblog.com/2011/12/the-problematic-ndaa-on-clear-statements-and-non-battlefield-detention/ ("The Second Circuit in *Padilla* specifically held that the [Non-Detention Act] requires 'clear' congressional authorization (which the AUMF didn't provide) for citizens picked up within the territorial United States.").

[210] *See supra* note 66.

inherent in such an authorization and the more than adequate strength of federal and state law enforcement.[211]

5. Purpose

The goal of all military action should be to prevent attacks against the United States and its allies. A reauthorized AUMF should not include a specific reference to the September 11 attacks, but rather should be oriented toward preventing future attacks on the United States by all terrorist organizations, especially by those organizations that are likely to attempt attacks on the United States. An explicit prospective approach would avoid conflation with the retributivist approach of criminal law and invocation of the internationally illegal concept of "reprisals."[212] Therefore, Congress should only authorize force against an organization if it has the intent and capability to target the United States or its allies.[213]

VI. Conclusion

The United States has been engaged in an armed conflict with Al Qaeda for over ten years, and arguably longer. Although this conflict began specifically focused on one relatively hierarchical organization concentrated in Afghanistan, it has since metastasized to include a plethora of groups and locations around the globe. These new "battlefields" in the "war on terrorism," however, do not correspond to the authorization currently employed to justify the United States' global efforts against terrorists. This discrepancy, already apparent to close

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[211] For a discussion of the near-military powers of state and federal non-military agencies, see New York Mayor Michael Bloomberg's recent comments on the New York Police Department. Tom Dworetzky, *Bloomberg's Army? The NYPD,* INT'L BUS. TIMES, Nov. 30, 2011, http://newyork.ibtimes.com/articles/258988/20111130/bloomberg-army-nypd.htm ("I have my own army in the NYPD, which is the seventh biggest army in the world.").

[212] *See supra* note 74 and accompanying text.

[213] *See* U.S. Dep't of State, *supra* note 199 ("When reviewing potential targets, [the Bureau of Counterterrorism in the State Department] looks not only at the actual terrorist attacks that a group has carried out, but also at whether the group has engaged in planning and preparations for possible future acts of terrorism or retains the capability and intent to carry out such acts."); *see also* Ellis, *supra* note 187, at 247–48 ("[I]nsisting that the targeted groups pose a threat to U.S. security—perhaps by requiring the executive branch to make formal findings to Congress—would reduce the chance that America unwittingly aggregates local guerillas with Al Qaeda's global insurgency.").

observers, will only increase as U.S. forces depart Afghanistan, leaving no geographic focal point for military counterterrorism operations. There are certainly other ways in which to justify continued operations against terrorist groups around the globe, but these alternative routes stretch our law to its limits and function as a poor exemplar for a nation that purports to serve as a model of global stability. Therefore, a new statutory basis for the armed conflict against global terrorism is required in order to avoid both intolerable policy choices and potentially harmful legal rationales. But in revisiting the statute passed in the uncertain days after September 11, 2001, Congress should not institutionalize an overly broad conception of this conflict. Careful attention to language and timing provisions, as well as ensuring a regular and continuous role for congressional review, can result in an appropriate statute that authorizes effective national security policy while maintaining the separation of powers and protecting individual liberties.

Of course, suggesting a reauthorization of the use of military force against terrorists around the globe to some degree necessarily entrenches the idea that all acts of terrorism against the United States should be viewed as elements of an "armed conflict," rather than as a law enforcement problem. This approach, however, is a realistic reflection of the current prevailing winds of U.S. national security policy, at least in the near term. Today, the threat posed by Al Qaeda is principally military in nature. The threat posed by other terrorists and terrorist groups, however, is evolving in myriad ways – in form, degree, and source – and the United States should be prepared to adapt its policies to respond.[214]

In the long term, terrorism may continue as a military threat, or revert back to a criminal issue. Therefore, maintaining flexibility in U.S. policy towards terrorists—principally by creating time limits on military force authorizations—appropriately acknowledges that the threat of terrorism is a fickle enemy that is constantly evolving. Jihadist terrorism only emerged as a major threat to the United States after 9/11, and a glance at history suggests that a new threat will—sooner or later—take its place.[215] When the threat of terrorism evolves again, as it is likely to do,

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[214] *See* WITTES, *supra* note 36, at 47 (noting that the conflict with Al Qaeda is "a new kind of war" because "[t]he conflict has involved military force at times," but "[i]t has also involved civilian law enforcement," "covert actions," "immigration authorities and banking regulations," "training and liaison with foreign police and intelligence organizations," "and countless other expressions of federal power").

[215] Indeed, many thought that the principal terrorist threat to the United States throughout much of the Twentieth Century was that posed by Puerto Rican nationalists, a fact often

the U.S. Government should respond accordingly, rather than relying on the previous war's rationale. Although terrorism should be combated in whatever form it takes, entrenching one approach to countering terrorism should be avoided at all costs.

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forgotten in today's national security debates. *See* JAMES M. POLAND, UNDERSTANDING TERRORISM: GROUPS, STRATEGIES, AND RESPONSES 72 (1988) ("The most serious terrorist attacks in the United States have historically been groups seeking Puerto Rican independence."). In 2006, the Department of Justice did not include jihadist terrorism among the major "[c]urrent domestic terrorism threats," instead listing "animal rights extremists, eco-terrorists, anarchists, anti-government extremists such as 'sovereign citizens' and unauthorized militias, Black separatists, White supremacists, and anti-abortion extremists." U.S. DEP'T OF JUSTICE, COUNTERTERRORISM WHITE PAPER 59 (2006), *available at* http://trac.syr.edu/tracereports/terrorism/169/include/terrorism.whitepaper.pdf. These examples, of course, are of domestic terrorism, which differs significantly from that which the AUMF targets. Nonetheless, the point remains: threats from terrorism will always change.